

1. Study to support the Fitness Check of EU Consumer law – Country report UNITED KINGDOM

1.1. Unfair commercial practices and marketing

1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

What is the effectiveness of the UCPD (i.e. the national laws transposing it) in terms of:

- The overall effectiveness of the principle-based approach under this Directive;

The UCPD was largely transposed in the UK by the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR 2008).¹ The CPUTR 2008, which replaced 23 earlier enactments, closely follow the wording of the Directive.² A commercial practice is defined widely as ‘...any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product’.³ Moreover in *R v. X Ltd*⁴ the Court of Appeal confirmed that isolated incidents can constitute a commercial practice. Regulation 3(3)-(4) sets out when a commercial practice will be regarded as an unfair commercial practice:

‘(3) A commercial practice is unfair if—

(a) it contravenes the requirements of professional diligence; and

(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

(4) A commercial practice is unfair if—

(a) it is a misleading action under the provisions of regulation 5;

(b) it is a misleading omission under the provisions of regulation 6;

(c) it is aggressive under the provisions of regulation 7; or

(d) it is listed in Schedule 1.’⁵

The CPUTR 2008 originally relied on a dual system of enforcement consisting of (i) criminal sanctions and (ii) administrative sanctions. Initially the CPUTR 2008 did not specially provide for private rights of redress for consumers. More recently, however, the CPUTR 2008 has been amended to provide such rights of redress for consumers.⁶

In terms of the effectiveness of a principle-based approach under the UCPD, one concern is whether or not such an approach leads to an unacceptable level of uncertainty.⁷ This was certainly a concern of some of those consulted recently in

¹ SI 2008/1277.

² See, generally, H.G. Beale (ed.), *Chitty on Contracts* (32nd edn., Sweet & Maxwell, London, 2015) para. 38-145ff.

³ Regulation 2. Under the CPUTR 2008 a ‘consumer’ was initially defined as: ‘any individual who in relation to a commercial practice is acting for purposes which are outside his business’ (Regulation 2). This was subsequently amended to define a consumer as: ‘...an individual acting for purposes that are wholly or mainly outside that individual’s business’.

⁴ [2013] EWCA Crim 818.

⁵ Implementing UCPD, Article 5(5) and Annex I.

⁶ See 1.1.7 below.

⁷ Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431.

relation to whether or not the Property Misdescriptions Act 1991 should be repealed.⁸ On the other hand, such an approach does allow some flexibility in responding to unfair commercial practices.⁹ Early indications of proposed prosecutions under the CPUTR 2008 were low¹⁰ and this, combined with the strain on the public purse post-financial crisis,¹¹ helped create the case for the introduction of private rights of redress under the CPUTR 2008.¹²

- The practical benefits for consumers of the black list of unfair commercial practices annexed to this Directive, in particular its application in practical cases;

A purely black list approach to unfair commercial practices might have resulted in a reversal of the issues under the principle-based aspects of the UCPD: more certainty in terms of what constitutes an unfair commercial practice¹³ but less flexibility in terms of regulating evolving commercial practices. For this reason, arguably a hybrid approach (consisting of a blend of principle-based provisions and rule-based provisions) is preferable. In terms of rule-based provisions, one issue is how to ensure the currency of such rules and it may be that an approach analogous to the approach adopted in the UK under the UCTD, whereby the Secretary of State can amend the so-called 'grey' list,¹⁴ would be useful in this context.¹⁵

- The practical benefits for consumers arising from the Member States' use of the minimum harmonisation clauses for financial services and immovable property;

Such an approach can be justified on the grounds of the potential complexity of such transactions¹⁶ and, to some extent, specific existing EU interventions in relevant fields.¹⁷ In the UK, these justifications were reiterated for not extending specific rights of private redress under Part 4A, CPUTR 2008 to those areas.¹⁸ On the other hand, this creates the potential for added complexity and duplication which was a key factor¹⁹ in the recent repeal of the Property Misdescriptions Act 1991.²⁰

⁸ BIS, 'The Regulatory Framework for Home Buying and Selling: Government response to consultations on the Estate Agents Act and the Property Misdescriptions Act' (URN 12/1006 (2012)) at, for example, [39]: 'The Government understands the reasons why opponents to repeal of the PMA favour it over the CPRs. The PMA deals specifically with property and as such is easy to apply. The CPRs by contrast are not specific to the sector and, being principles-based, require traders to consider how they apply to their particular circumstances.'

⁹ Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431. On the relevance of context see: *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76.

¹⁰ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 2.7.

¹¹ See J. Devenney, 'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices', (2016) 5 EuCML 100. See also J. Garside, 'Trading standards institute: consumers are no longer protected', *The Guardian*, 7th August 2016.

¹² See 1.1.7 below.

¹³ Although some may need to be unpacked through case law (for example the meaning of falsity under Schedule 1, para. 17 (or para. 17 of Annex I of the UCPD).

¹⁴ See 1.2.1 below.

¹⁵ Although, given the overall maximum harmonisation nature of the UCPD, this would need to be done at an EU level.

¹⁶ See UCPD, Recital 9.

¹⁷ See UCPD, Recital 10.

¹⁸ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 6.118.

¹⁹ See BIS, 'The Regulatory Framework for Home Buying and Selling: Government response to consultations on the Estate Agents Act and the Property Misdescriptions Act' (URN 12/1006 (2012)) at para. 40: 'The Government remains of the view, however, that the CPRs provide broadly similar protection to the PMA. The queries and concerns raised are similar to those that were raised when the CPRs were first proposed and these fears do not seem to have materialised in other sectors. The Government believes this situation will continue so long as the PMA remains in place and that repealing the PMA would not significantly reduce levels of consumer protection. This is disputed by some stakeholders but not others and the Government does not find the arguments for a loss of consumer protection convincing. The Government will therefore lay before Parliament an Order to repeal the PMA. The current intention is that this will come into force not before October 2013.'

- The effectiveness and practical benefits for consumers of the application of Directive's rules in tackling misleading environmental claims / in addressing misleading practices in the energy market; [*Key aspects to consider are: To what extent has the UCPD been applied in the context of environmental claims/in the energy market? How effective was it? What are the problems, if any?*]

Although there is not a discrete body of EU Law on environmental or green advertising, a number of EU initiatives make provision in this regard.²¹ For example, Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91²² provides:

'Use of terms referring to organic production

1. For the purposes of this Regulation a product shall be regarded as bearing terms referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules laid down in this Regulation. In particular, the terms listed in the Annex, their derivatives or diminutives, such as 'bio' and 'eco', alone or combined, may be used throughout the Community and in any Community language for the labelling and advertising of products which satisfy the requirements set out under or pursuant to this Regulation.

In the labelling and advertising of live or unprocessed agricultural products terms referring to the organic production method may be used only where, in addition, all the ingredients of that product have also been produced in accordance with the requirements laid down in this Regulation.

2. The terms referred to in paragraph 1 shall not be used anywhere in the Community and in any Community language for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out under this Regulation, unless they are not applied to agricultural products in food or feed or clearly have no connection with organic production.

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used.

3. The terms referred to in paragraph 1 shall not be used for a product for which it has to be indicated in the labelling or advertising that it contains GMOs, consists of GMOs or is produced from GMOs according to Community provisions.²³

It is also clear that the general provisions of the CPUTR 2008 can apply to environmental/green advertising.²⁴ However, given the specialised nature of this context, there is perhaps the need for some further guidance on the application of the CPUTR 2008 to such claims.²⁵

²⁰ See Property Misdescriptions Act 1991 (Repeal) Order 2013.

²¹ See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 2.5.1ff.

²² Official Journal L 189, 20/07/2007 p. 1.

²³ Article 23.

²⁴ See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 2.5.1ff.

²⁵ Cf. DEFRA, *Green Claims Guidance* (PB13453 (2011)).

- The practical benefits for consumers of the "average consumer" as the reference point for assessing whether a commercial practice is likely to materially distort economic behaviour; [*Key aspects to consider are: How does the concept of "average consumer" work in practice? Is the concept applied in your country rigidly?*]

Regulations 5, 6 and 7 of the CPUTR 2008 use the concept of an 'average consumer' as a benchmark. Regulation 2(2) provides some assistance in relation to this concept:

'In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.'

Some earlier directives did not, at least explicitly, provide a means of benchmarking relevant provisions which, of course, provided the more potential for uncertainty and inconsistency.²⁶ Thus, at a general level, the explicit indication of a relevant benchmark is arguably to be welcomed. Yet whether, given the non-homogeneous nature of consumer vulnerabilities,²⁷ an 'average consumer' test always results in a high level of consumer protection is debatable.²⁸ Moreover, the consumer organisation Which? has observed:

'... the evidence suggests that the main risks in the concept of the 'average consumer' are:

- The average consumer, being defined as reasonably well informed and reasonably observant, is mistakenly thought to refer to the real average consumer, which may or may not be one or both of these two things, likely depending on the specific context where the concept is applied.
- The concept of the 'average consumer' may be too ambiguous for practical purposes because it varies so much depending on the sector or market.

Behavioural science is an area that has developed considerably since the UCPD was adopted over a decade ago. In our view, REFIT provides a unique opportunity to modernise the UCPD in line with the way that consumers behave in the real world.'

- The practical benefits for consumers of the specific protection of "vulnerable consumers" introduced by the directive; [*Key aspects to consider are: Have enforcement authorities/courts in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

On the other hand Regulation 2(4)-(5) of the CPUTR 2008 provides:

'(4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group. (5) In determining the effect of a commercial practice on the average consumer— (a) where a clearly identifiable group of consumers

²⁶ Cf. UCTD and *Kásler v OTP Jelzálogbank Zrt* (C-26/13) [2014] 2 All E.R. (Comm) 443.

²⁷ J. Devenney, 'Conceptualising Consumers in the Law of England and Wales' in K. Riesenhuber and F. Klinck (eds), *Verbraucherleitbilder: Interdisziplinäre und Europäische Perspektiven* (de Gruyter, 2015) at p.161. The Consumer Council for Northern Ireland noted: 'Our research also found that younger consumers (those aged 16-24), older consumers (aged 65+), and consumers from a lower income bracket were less likely to feel well informed about their rights. We therefore prioritise our education campaign work to target these audiences in an effort to make them less vulnerable and better informed consumers.'

²⁸ As opposed, for example, to further internal market ambitions: see, for example, M. Himoni, *European consumer law: a law for the consumer or the internal market? The case of the consumer right directive and its application to the UK and Cypriot regimes* (unpublished Ph.D thesis, University of Leeds, 2016).

is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.'

Thus the standard 'average consumer' test is, for example, adjusted where the commercial practice is directed at a particularly vulnerable group. For the reasons given above this is likely to result in a greater level of consumer protection although, perhaps justifiably from the point of view of the burden on traders,²⁹ it is limited to situations where the trader had a particular degree of knowledge of the situation.

- How and which self-and co-regulation actions in EU countries or at EU level have been effective in addressing unfair commercial practices. [*Key aspects to consider are: To what extent do self/co-regulation actions work in practice, are they useful according to stakeholders?*]

Advertising is an area where, in the UK, there is a multi-dimensional approach to regulation which includes '...many controls – some voluntary, some moral and some statutory.'³⁰ This includes self-regulation for non-broadcast advertising (through the independent Advertising Standards Authority (ASA)), co-regulation of broadcast advertising (through the ASA and Ofcom)³¹ and trade codes of practice.³² It also includes various statutory provisions including the CPUTR 2008 and s.319 of the Communications Act 2003 which provides:

'(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

(a) that persons under the age of eighteen are protected;

(b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;

(c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;

(d) that news included in television and radio services is reported with due accuracy;

²⁹ In the UK, for example, there has been a deregulation agenda in recent times. See the claim in Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.5: 'The reforms taken together are estimated to be worth over £4 billion to the UK economy over 10 years in quantified net benefits. Clarification and simplification mean consumers should spend less time trying to understand their rights, less time and resource applying them, and no longer waste time when they have misunderstood their rights. Businesses should also spend less time having to interpret complex legislation. Where things do go wrong, the proposals allow wider options for redress for both businesses and consumers who have lost out when consumer or competition law has been broken. The proposals also reduce regulatory costs for business. Problems following consumer purchases should be addressed more quickly, with lower complaint handling costs and fewer cases taken to court.' See also GHK, 'Consumer rights and economic growth' (Final Report, 2013). Note also the comment from the UK European Consumer Centre: 'We are aware that Financial Conduct Authority does recognise individuals with unmanageable level of debt as potentially vulnerable.'

³⁰ See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 5.1.

³¹ See Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 2004/1975).

³² See: <http://www.tradingstandards.uk/advice/ConsumerCodes.cfm>

- (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
- (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
- (fa) that the product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements);
- (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;
- (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- (j) that the unsuitable sponsorship of programmes included in television and radio services is prevented;
- (k) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and
- (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.³³

- In a forward looking perspective: Is there a need to extend or modify the black list of the UCPD? If so, please indicate the practice(s) to be added to the list. Should there be a mechanism for subsequent inclusion of new practices into the UCPD black list to respond to new developments?

Review mechanisms have been addressed above. As will be noted below, particular types of contractual term might be added to the 'black' list.³⁴

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The establishment of private rights of redress for unfair commercial practices and the ability to evolve, at an EU level, the 'black' list have been mentioned above. It could be suggested that it would be helpful to explore ways of further collating and categorising examples of unfair commercial practices arising from case law across the EU.³⁵

³³ Emphasis added.

³⁴ See 1.2.1.

³⁵ Cf. in relation to the UCTD below.

1.1.2. Effectiveness of the PID in establishing a high level of consumer protection

What is the effectiveness of the PID (i.e. the national laws transposing it) in terms of:

- Whether and to what extent consumers are effectively informed about the unit selling price;

The PID is, in general terms,³⁶ transposed by the Price Marking Order 2004 (PMO).³⁷ Article 5³⁸ makes provision in relation to unit prices.³⁹ The application of this provision, particularly in relation to promotional schemes, can vary.⁴⁰ The Department for Business, Energy and Industrial Strategy commented in the interview process that: 'We consider the Price Indication Directive to be a useful tool to enable consumers to identify the best deal, and that the minimum harmonisation measure is important, for example in allowing for other units of quantity that are widely and customarily used in a Member State, or the transitional derogation for certain small retail businesses.'⁴¹

On 21 April 2015 Which? submitted a super-complaint to the Competition and Markets Authority (CMA) concerning pricing practices in the groceries sector.⁴² The CMA did '...not consider there to be a systemic problem in the groceries market in how retailers present prices, concluding that problems are not occurring in large numbers across the whole sector and that generally retailers are taking compliance with legislation seriously to avoid such problems occurring'.⁴³ However, the CMA did make a number of recommendations specifically in relation to unit pricing (which were generally endorsed by the Government):⁴⁴

'Recommendation 2: The CMA recommends that BIS produces best practice guidelines on the legibility of unit pricing information, to provide greater clarity about the requirements of the PMO in this regard. This would help TSS and

³⁶ Cf. Price Marking Order (Northern Ireland) 2004 (SI 2004/368).

³⁷ SI 2004/102.

³⁸ '(1) Subject to paragraph (2), (3) and (4) and article 9, where a trader indicates that any product is or may be for sale to a consumer, he shall indicate the unit price of that product in accordance with the provisions of this Order.

(2) The requirement in paragraph (1) only applies in respect of products sold from bulk or required by or under Parts IV or V of the Weights and Measures Act 1985 to be:

(a) marked with an indication of quantity; or

(b) made up in a quantity prescribed by or under that Act.

(3) The requirement in paragraph (1) shall not apply in relation to:

(a) any product which falls within Schedule 2;

(b) any product the unit price of which is identical to its selling price;

(c) bread made up in a prescribed quantity which is or may be for sale in a small shop, by an itinerant trader or from a vending machine; or

(d) any product which is pre-packaged in a constant quantity which is or may be for sale in a small shop, by an itinerant trader or from a vending machine.

(4) The requirement in paragraph (1) applies in relation to an advertisement for a product only where the selling price of the product is indicated in the advertisement.'

³⁹ Defined in Article 1(2): "unit price" means the final price, including VAT and all other taxes, for one kilogram, one litre, one metre, one square metre or one cubic metre of a product, except (i) in respect of the products specified in Schedule 1, where unit price means the final price including VAT and all other taxes for the corresponding units of quantity set out in that Schedule; and (ii) in respect of products sold by number, where unit price means the final price including VAT and all other taxes for an individual item of the product.'

⁴⁰ See, generally, O'Keefe, *The Law of Weights and Measures* (2nd. Edn., Butterworth, London, 1996-) at 2.6539.

⁴¹ 11 August 2016.

⁴² See <https://www.gov.uk/government/news/cma-receives-super-complaint-from-which?>

⁴³ See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)) p.3. Similarly the UK European Consumer Centre noted: 'The UK European Consumer Centre noted: "Major retailers do indicate various unit prices (weight, liquid quantity) on the price tags. This information is provided in practical manner. The consumers can compare these prices, should they wish to do so.'

⁴⁴ See also Trading Standards Institute, *Pricing Practices Review: Call for Evidence Responses*, (2014).

Primary Authorities assess compliance. We also recommend that retailers introduce any resulting changes to labelling as soon as practicable...⁴⁵

Recommendation 3: We recommend that BIS continues its review, with the Expert Working Group, of Schedule 1 to the PMO, but changes the focus to give particular consideration to:

- (a) Ways to clarify and simplify the requirements, considering evidence about the advantages and disadvantages of simpler and more future-proofed approaches, with fewer exceptions, used in other countries, and
- (b) What further research, building on the findings from our qualitative research, is needed into how consumers use unit prices to ensure the requirements help as many people as possible to use them in their decision-making...

Recommendation 4: To encourage a more consistent use of unit pricing for products on promotion,⁴⁶ the CMA recommends that BIS considers reviewing and clarifying the legal requirements set out in Article 9 of the PMO, and the associated guidance. This should be done with particular reference to the requirements of the CPRs and the ongoing review of the PPG...⁴⁷

Recommendation 5: The CMA recommends that Which? and other consumer representative organisations consider whether there is a further role they can play in consumer education on the effective use of unit prices. Further, following any further work by BIS on our above recommendations, there will be a further need to educate consumers on any changes to unit pricing.⁴⁸

- Where a recognised measurement unit for a product's performance exists and is displayed to consumers (e.g. number of washloads for detergents), should the "unit price" for such product be indicated per such "performance" measurement units rather than per 1 kg or 1 litre?

The definition of 'unit price' and the exceptions contained in Schedule 1 have already been noted. The indication of 'unit price' in specific performance measurement units could, if the process does not become too complicated,⁴⁹ be helpful to a consumer. The UK European Consumer Centre noted: 'We believe that offering this kind of weight indication may create confusion to consumers, as it may be more difficult to compare in this manner. The performance information is easier to consider by an average consumer at the point of purchase.'

⁴⁵ Which? noted: 'Article 3(1) of the PID provides that the unit price need not be indicated where it is identical to the sales price. While this may be an appropriate approach for many products, it is not clear why this is appropriate in the context of food and other consumables or groceries that are commonly purchased in a supermarket environment...Our fieldwork has found that - even for groceries - the unit price may not be shown where the selling price is the same. Yet, in an environment where unit prices are prolific (such as a supermarket shelf), consumers will not necessarily appreciate that this is the reason why the unit price is not included. Removing the requirement to provide unit prices in this scenario creates more, not less, confusion for shoppers. We would recommend that this exemption be removed for food products and groceries.'

⁴⁶ Which? noted: 'Our super-complaint found that unit prices were not being displayed for products that were on promotion (for example, '50% off' or 'buy-one-get-one-free' special offers). The PID must make clear that the obligation to display unit pricing does not fall away when goods are offered at promotional prices and should establish clear rules for how those unit prices should be calculated.'

⁴⁷ Which? also observed: 'Some degree of flexibility around the units available to traders is likely to be necessary and appropriate. However, we would suggest that the broad language in Article 2 is narrowed to ensure that confusion is not caused by consumers seeing a vast array of different units being used. Alternatively, the Directive could make clear that the ability to use different units should be granted only in exceptional circumstances, where there is clear, objective evidence that detriment would be caused if one of the core units had to be relied upon.'

⁴⁸ CMA, *Pricing Practices in the Groceries Market Response to a super-complaint made by Which? on 21 April 2015* (2015) at 8.6ff.

⁴⁹ Cf. See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)) at p.3 where there is an intention to simplify Schedule 1 in line with other EU countries.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

The small business, or small shop,⁵⁰ exemption is contained in Schedule 2. There may be some debate on exactly how the floor area is calculated to determine whether or not a shop is a small shop.⁵¹ The UK European Consumer Centre tentatively noted: 'Everyday observation suggests that smaller shops normally don't provide information about the unit price. Given the nature of our service (cross border consumer advice and mediation), we tend not to receive such complaints.'

Which? noted: 'While this exemption is presumably designed to protect small, independent retailers from incurring disproportionate cost, it does not reflect the fact that many small shops are part of national chains. This issue was considered when the Directive was appraised in 2004, but it has not been resolved. At that time, it was recommended that only those smaller businesses for which unit pricing poses a real burden are exempted from the requirements. REFIT presents an opportunity to ensure this recommendation is expressly enshrined in the PID.'

1.1.3. Effectiveness of the MCAD in providing protection for businesses

What is the effectiveness of the MCAD (i.e. the national laws transposing it) in terms of:

- The scope of protection under the Directive, in particular whether the scope limited to the notion of 'advertising' provides effective protection for businesses;

The MCAD was primarily transposed in the UK by the Business Protection from Misleading Marketing Regulations 2008 (BPMR 2008).⁵² Regulation 3 prohibits advertising which misleads traders, with Regulation 3(2) providing:

'Advertising is misleading which—

(a) in any way, including its presentation, deceives or is likely to deceive the traders to whom it is addressed or whom it reaches; and by reason of its deceptive nature, is likely to affect their economic behaviour; or

(b) for those reasons, injures or is likely to injure a competitor.'⁵³

Under Regulation 2(1) advertising is defined widely to mean '...any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product and 'advertiser' shall be

⁵⁰ Defined in Article 1(2) as: 'any shop which has a 'relevant floor area' not exceeding 280 square metres'.

⁵¹ See, generally, O'Keefe, *The Law of Weights and Measures* (2nd. Edn., Butterworth, London, 1996-) at 2.6539.

⁵² SI 2008/1276.

⁵³ Note also Regulation 2(3)-(5): '(3) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning—(a) the characteristics of the product (as defined in paragraph (4)); (b) the price or manner in which the price is calculated; (c) the conditions on which the product is supplied or provided; and (d) the nature, attributes and rights of the advertiser (as defined in paragraph (5)). (4) In paragraph (3)(a) the 'characteristics of the product' include—(a) availability of the product; (b) nature of the product; (c) execution of the product; (d) composition of the product; (e) method and date of manufacture of the product; (f) method and date of provision of the product; (g) fitness for purpose of the product; (h) uses of the product; (i) quantity of the product; (j) specification of the product;(k) geographical or commercial origin of the product; (l) results to be expected from use of the product; or (m) results and material features of tests or checks carried out on the product. (5) In paragraph (3)(d) the 'nature, attributes and rights' of the advertiser include the advertiser's— (a) identity; (b) assets;(c) qualifications; (d) ownership of industrial, commercial or intellectual property rights; or (e) awards and distinctions.'

construed accordingly'.⁵⁴ The BPMMR 2008 do not affect the validity of an agreement⁵⁵ but they do provide criminal liability for misleading advertising.⁵⁶

- The overall effectiveness of the principle-based approach to misleading advertising under this Directive;

Given the many different possible forms of advertising, particularly under the extended definition in the BPMMR 2008, it would seem that a principle-based approach is appropriate.⁵⁷ One issue, however, surrounds the use of criminal sanctions for misleading advertising and, more specifically, whether or not it is appropriate (and/or inhibits cross-border trade) to deploy criminal liability in cases which do not amount to fraud.⁵⁸ The BPMMR 2008 deal with that issue, to some extent, with a due diligence defence under Regulation 11:

'In any proceedings against a person for an offence under regulation 6 it is a defence for that person to prove—

(a) that the commission of the offence was due to—

(i) a mistake;

(ii) reliance on information supplied to him by another person;

(iii) the act or default of another person;

(iv) an accident; or

(v) another cause beyond his control;

And

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCAD, if any, have been providing a higher level of protection? If so, how? Are there other rules protecting B2B transactions applied by Member States (e.g. through extending the UCPD)?*]

Given the potential reach of the MCAD,⁵⁹ it is not clear that a public enforcement regime, as provided under the BPMMR 2008, would in itself sufficient. However, such a regime is, in the UK, supplemented by the availability of various private law actions.⁶⁰

- The effects of the full harmonisation provisions on comparative advertising;

The full harmonisation provisions in the MCAD are restricted to '...comparative advertising as far as the comparison is concerned'⁶¹ and this is, arguably, justified on

⁵⁴ Emphasis added. See also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 227A.

⁵⁵ See Regulation 29.

⁵⁶ See Regulation 6. Regulation 8 makes provision in relation to the liability of companies.

⁵⁷ Cf. *Director General of Fair Trading v Tobyward Ltd* [1989] 1 W.L.R. 517.

⁵⁸ Cf., in a slightly different context, *South Australia Asset Management v. York Montague* [1996] All ER 365 at 374 per Lord Hoffmann. See also J. Devenney, 'Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence', in L. Di Matteo, K. Rowley, Q. Zhou & S. Santier, *Current Issues in Commercial Contracts: Transatlantic Perspectives* (Cambridge University Press, 2013).

⁵⁹ Cf. Recital 4.

⁶⁰ See, for example, A.M. Dugdale, M. Jones and M. Simpson, *Clerk and Lindsell on Torts*, (21st edn., Sweet & Maxwell, 2015) at 23-18.

⁶¹ MCAD, Article 8(1).

the effect comparative advertising can have on competition.⁶² Regulation 4 of the BPMMR 2008 provides:

'Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met—

- (a) it is not misleading under regulation 3;
- (b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 or a misleading omission under regulation 6 of those Regulations;
- (c) it compares products meeting the same needs or intended for the same purpose;
- (d) it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price;
- (e) it does not create confusion among traders—
 - (i) between the advertiser and a competitor, or
 - (ii) between the trade marks, trade names, other distinguishing marks or products of the advertiser and those of a competitor;
- (f) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor;
- (g) for products with designation of origin, it relates in each case to products with the same designation;
- (h) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (i) it does not present products as imitations or replicas of products bearing a protected trade mark or trade name.'

- Whether the comparative advertising rules provide an effective legal framework for modern types of marketing where a competitor or a product offered by a competitor can be identified;

Regulation 4 of the BPMMR 2008 is enforced, under Part 3, by various enforcers including the CMA. Again it is not clear that a public enforcement regime, as provided under the BPMMR 2008, would in itself be sufficient. However, such a regime is, in the UK, supplemented by the availability of various private law actions.⁶³

⁶² Recital 6.

⁶³ See, for example, A.M. Dugdale, M. Jones and M. Simpson, *Clerk and Lindsell on Torts*, (21st edn., Sweet & Maxwell, 2015) at 23-18. Note, however, Lord Herschell's statement in *White v Mellin* [1895] A.C. 154 at 165 that the courts should not become '...a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better'.

- Whether the current rules on enforcement set in the MCAD provide an effective enforcement framework, especially in the context of cross-border transactions.

Part 3 of BPMMR 2008 outlines enforcement powers given, for example, to the CMA.⁶⁴ Thought should be given to whether or not the MCAD should also set-out private rights of redress.⁶⁵

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

This has been covered under the last item.

1.1.4. Effectiveness of current rules in eliminating obstacles to the Internal Market

What is the effectiveness of the UCPD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade;

By way of background, the relevant literature identifies some disparities in approach to the UCPD in Member States.⁶⁶ However, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.⁶⁷

- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested. Moreover, as the (now) CJEU case law indicates, it is not clear that there is a single 'black' list.⁶⁸

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested. Nevertheless, given the complexity of this area of law,⁶⁹ it is possible to make a case that the minimum harmonisation

⁶⁴ Regulation 18 provides: '(1) The court on an application by an enforcement authority may grant an injunction on such terms as it may think fit to secure compliance with regulation 3, 4 or 5. (2) Before granting an injunction the court shall have regard to all the interests involved and in particular the public interest. (3) An injunction may relate not only to particular advertising but to any advertising in similar terms or likely to convey a similar impression. (4) The court may also require any person against whom an injunction (other than an interim injunction) is granted to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the advertising— (a) the injunction; and (b) a corrective statement.'

⁶⁵ Cf. 1.1.7.

⁶⁶ Cf. G. Howells, H-W. Micklitz and T. Wilhelmsson, 'Towards a better understanding of unfair commercial practices', (2009) 51 Int. J.L.M. 69.

⁶⁷ See, for example, R. Halson and D. Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), *The Transformation of European Private Law*, (Cambridge University Press 2013).

⁶⁸ See European Commission, *Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*, (COM(2013) 139 final) at 3.1ff.

⁶⁹ On which see above. See also J. Devenney & M. Kenny, 'Omission of Personal Property from the Proposed CESL: The Hamlet Syndrome...Without the Prince?' [2015] *The Journal of Business Law* 607.

derogation under the UCPD having, at least, some, negative, impact on cross-border trade.⁷⁰

What is the effectiveness of the MCAD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade;

By way of background and analogy, it should be noted that the relevant literature identifies some disparities in approach to the UCPD (the sister directive to the MCAD) in Member States.⁷¹ However, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.⁷²

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.

- Whether the fully harmonised provisions on comparative advertising provide an appropriate legal framework in cross-border trade for advertising where a competitor or a product offered by a competitor can be identified;

As noted above, the full harmonisation provisions in the MCAD are restricted to '...comparative advertising as far as the comparison is concerned'⁷³ and this is, arguably, justified on the effect comparative advertising can have on competition.⁷⁴ One challenge for the EU legislator is how to maintain the 'currency' of the MCAD following, for example, multiple decisions from the (now) CJEU.⁷⁵

- Whether the lack of cross-border enforcement mechanism in B2B relations constitutes a barrier to cross-border trade.

By way of background, it can be argued that the remedies/enforcement regime in relation to EU directives is, sometimes, insufficient and this can impact on the effectiveness of a particular directive.⁷⁶ This can also apply to the cross-border enforcement dimension.⁷⁷

⁷⁰ Cf. L. Poro, 'Unfair commercial practices in financial services: is the EU legal framework sufficient to protect consumers?' (2014) 29 J.I.B.L.R. 422.

⁷¹ Cf. G. Howells, H-W. Micklitz and T. Wilhelmsson, 'Towards a better understanding of unfair commercial practices', (2009) 51 Int. J.L.M. 69.

⁷² See, for example, R. Halson and D. Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), *The Transformation of Private Law*, (Cambridge University Press 2013).

⁷³ MCAD, Article 8(1).

⁷⁴ Recital 6.

⁷⁵ On which, in relation to comparative advertising, see D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 229.

⁷⁶ J. Devenney, M. Kenny & L. Gillies, 'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', (2012) *Yearbook of Private International Law* 315 at 335-336.

⁷⁷ See J. Devenney & T. Pfeiffer, 'Control of Standard Terms (Collective Proceedings)' in G. Dannemann & S. Vogenauer, *The Common Frame of Reference for European Contract Law and its Interaction with English and German Law* (Oxford University Press, 2013).

1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*Key aspects to consider are: How are these rules applied in practice? To what extent do traders implement these rules? Are these information requirements under the UCPD useful in view of the more comprehensive pre-contractual information requirements of the CRD?*]

Regulation 6 of the CPUTR 2008 provides:

‘(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)⁷⁸—

- (a) the commercial practice omits material information,
- (b) the commercial practice hides material information,
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.’⁷⁹

Regulation 6(4), emanating from Article 7(4) of the UCPD, outlines ‘material information’ in the context of invitations to purchase:

‘(4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)—

- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;
- (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
- (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;
- (d) either—
 - (i) the price, including any taxes; or
 - (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either—
 - (i) all additional freight, delivery or postal charges; or

⁷⁸ ‘(2) The matters referred to in paragraph (1) are—

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.’

⁷⁹ Emphasis added. Regulation 6(3) provides: ‘(3) In paragraph (1) ‘material information’ means—(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and (b) any information requirement which applies in relation to a commercial communication as a result of an EU obligation.’

- (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) the following matters where they depart from the requirements of professional diligence—
 - (i) arrangements for payment,
 - (ii) arrangements for delivery,
 - (iii) arrangements for performance,
 - (iv) complaint handling policy;
- (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.'

The OFT provided detailed guidance on this provision (now adopted by the CMA).⁸⁰ However, the extent to which traders are aware of these requirements is unclear.⁸¹ On the other hand the UK European Consumer Centre noted: 'Overall [there is a] good level of awareness in the United Kingdom. There are incidents where the companies may not provide some of the required information, this is dealt with by the appropriate Trading Standards authorities, based on proportionality... Generally speaking traders tend to adhere to the rules. This is only based on anecdotal knowledge of the market and complaints received.'

- Is there any overlap with the provisions of the Services Directive and the E-commerce Directive that apply to advertising? If so, are there any costs arising for public authorities and/or businesses due to this multiplicity of information obligations?

By way of background, it should, first, be noted that the precise impact on consumer protection of the provision of information is contested and will vary depending on the context.⁸² Secondly, it should be noted that there are now a plethora of information duties affecting contracts with consumers. For example, s.12 of the Consumer Rights Act 2015 ('[o]ther pre-contract information included in contract') provides:

'(1) This section applies to any contract to supply goods. (2) Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)⁸³ required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.'

This provision is not straightforward, not least as s.12(1) states that it 'applies to any contract to supply goods' whereas the Consumer Contracts (Information, Cancellation

⁸⁰ OFT, Consumer Protection from Unfair Trading Regulations 2008 Guidance on the Implementation of the Unfair Commercial Practices Directive, (OFT 1008 (2008)) at 7.20ff. The UK European Consumer Centre noted: 'These information requirements are generally the same as in the CRD. We believe these are useful, as a part of the UCPD (as well as national regulations), because the weight of breach of these tends to be considered as bigger than the information requirements under CRD.'

⁸¹ Some of the requirements would, it is submitted, be routinely provided in many cases (e.g. the price).

⁸² Cf. J. Luzak, 'Online disclosure rules of the Consumer Rights Directive: Protecting passive or active consumers?' (2015) 3 Journal of European Consumer and Market Law 79.

⁸³ Which partially implement the Consumer Rights Directive (CRD) (Directive 2011/83/EC).

and Additional Charges) Regulations 2013⁸⁴ sometimes limit a particular information requirement to a particular type of contract (for example a sales contract⁸⁵).⁸⁶ Moreover it is not always clear exactly how some of these terms, emanating from the provision of particular information, is to operate,⁸⁷ particularly when read with s.12(3), Consumer Rights Act 2015.⁸⁸ For example, under Schedule 1, paragraph (b) 'the identity of the trader (such as the trader's trading name), the geographical address at which the trader is established and the trader's telephone number...'. Presumably this does not mean that, for example, the trader cannot change telephone number or cannot change it without the agreement of the consumer (or all relevant consumers!)? Is the relevant requirement to somehow make available⁸⁹ changes to a telephone number?⁹⁰

There is also the risk of unnecessary overlap or fragmentation as demonstrated by Regulation 6⁹¹ the Electronic Commerce (EC Directive) Regulations 2002⁹² or the

⁸⁴ These Regulations, of course, implement Directive 2011/83/EU on consumer rights [2011] O.J. L304/64, Article 3(1) of which is expressed in wide terms: 'This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.' The Regulations do not apply to a number of situations including contracts '...(b) for services of a banking, credit, insurance, personal pension, investment or payment nature...' (Regulation 6).

⁸⁵ Defined by Regulation 5.

⁸⁶ See, for example, Schedule 2, para. (p).

⁸⁷ See also Regulation 18.

⁸⁸ 'A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.'

⁸⁹ See Regulation 8: 'For the purposes of this Part, something is made available to a consumer only if the consumer can reasonably be expected to know how to access it.'

⁹⁰ In Schedule 2 the corresponding requirement is expressed in slightly different terms: '...(c) the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently...'.

⁹¹ '(1) A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information—

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;

(d) where the service provider is registered in a trade or similar register available to the public, details of the register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) where the service provider exercises a regulated profession—

(i) the details of any professional body or similar institution with which the service provider is registered;

(ii) his professional title and the member State where that title has been granted;

(iii) a reference to the professional rules applicable to the service provider in the member State of establishment and the means to access them; and

(g) where the service provider undertakes an activity that is subject to value added tax, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment 1.

(2) Where a person providing an information society service refers to prices, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.'

Financial Services (Distance Marketing) Regulations 2004.⁹³ On a more general level the Consumer Council for Northern Ireland reported:

'...the Consumer Council undertook with NI businesses, we found just under a third of NI businesses, particularly SME's, reported finding it difficult to keep up to date with consumer law [...] A key factor to the successful implementation of new consumer law is the education campaign that accompanies them. Increasingly there has been a move towards producing concise, user-friendly, plain language guides that communicate key changes and signpost to more detailed guidance where needed. This is to be commended. However, there remains a challenge in ensuring such information is disseminated as widely as possible and that it reaches those who need it most, when they need it.'

1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- Whether an extension of the Unfair Commercial Practices Directive to B2B transactions or a revision/extension of the Misleading and Comparative Advertising Directive would bring benefits for cross-border trade;

As noted above,⁹⁴ the CPUTR 2008 only apply to B2C⁹⁵ transactions although the definition of a consumer has been slightly widened recently.⁹⁶ As will be noted below, some (particularly small) businesses are affected by similar vulnerabilities to some consumers.⁹⁷ Nevertheless in the B2B context, creating, for example, a 'black' list of unfair commercial practices, which in line with the CPUTR 2008 attract criminal sanctions, is likely to be controversial and may, depending on the approach adopted, be regarded as too burdensome on businesses.⁹⁸ That is not, of course, to claim that there are not some commercial practices which in a B2B context would be regarded as being on a 'virtual' black list.⁹⁹

The Department of Business, Energy and Industrial Strategy commented: 'In general the UK Government believes in the principle of freedom to contract for businesses. Our call for evidence on small businesses as consumers demonstrated that extension of Unfair Contract Terms to Business to Business was not needed and that there were risks involved in doing so. The Department for Business, Energy and Industrial Strategy also published a consultation exploring whether certain further protections for the smallest businesses were needed when dealing with the non-regulated sectors. Responses are currently being analysed and a full Government response, together

⁹² SI 2002/2013, transposing Article 5 of the Electronic Commerce Directive (Directive 2000/31/EC). Regulation 6 refers to 'information society service' which is defined, in complicated terms, in Regulation 2: 'information society services' (which is summarised in recital 17 of the Directive as covering 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service') has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of 20 July 1998)'.

⁹³ SI 2004/2095 transposing Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] OJ L271/16. Financial services are excluded from the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134): see Regulation 6(1)(b).

⁹⁴ See 1.1.1.

⁹⁵ See also, for example, Regulation 27A(2)(b) on C2B transactions.

⁹⁶ Under the CPUTR 2008 a "consumer" was initially defined as: "any individual who in relation to a commercial practice is acting for purposes which are outside his business" (Regulation 2). This was subsequently amended to define a consumer as: "...an individual acting for purposes that are wholly or mainly outside that individual's business".

⁹⁷ See 1.2.3.

⁹⁸ See above at 1.1.3.

⁹⁹ See, for example, the Auctions (Bidding Agreements) Act 1927, s.1. It also needs to be considered whether the harmonisation of such individual rules would contribute to cross-border trade.

with any recommendations, will be issued later this year. Issues to be considered include freedom to contract, the needs of different sectors, competitiveness of SMEs and market functions, the impact on consumers of relevant case law and the potential weakening of consumer rights.¹⁰⁰

- Whether it is appropriate to keep separate legal regimes for B2B and B2C transactions in the area of commercial practices and to what extent both regimes could be aligned;

In recent years in the UK there has been some move to separate B2B and B2C regimes, most notably with the Consumer Rights Act 2015 which largely separates the laws on supply of goods and unfair terms along these lines. One reason for such a split is that different policy considerations may be involved in these two contexts.¹⁰¹

- The appropriate scope of the protection in B2B transactions – whether the protection should cover only the pre-contractual stage (i.e. misleading or aggressive marketing) or should also cover unfair commercial practices during and after the transaction;

As suggested below,¹⁰² there is an argument to cover the use of some types of contractual term in unfair commercial practices legislation even in the B2B context. Yet, overall, from a UK perspective this is likely to be controversial, not least due to what might be, at least, perceived as an interface with a doctrine of 'good faith' in contract performance.¹⁰³

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

There may be some difficulty in drafting such a list. An alternative would be to supplement legislation with detailed indicative guidance.¹⁰⁴

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

This has been commented on above.¹⁰⁵

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

This has been commented on above.¹⁰⁶

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

As noted above,¹⁰⁷ on 21st April 2015 Which? submitted a super-complaint to the Competition and Markets Authority (CMA) concerned pricing practices in the groceries

¹⁰⁰ 11 August 2016

¹⁰¹ Cf. H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-462.

¹⁰² See 1.2.3.

¹⁰³ Cf., for example, *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45] per Moore-Bick LJ (hostility to concept of good faith).

¹⁰⁴ Although cf. the rather brief OFT, *Business to Business Promotions and Comparative Advertisements: A Quick Guide to the Business Protection from Marketing Regulations 2008* (OFT 1056 (2008)).

¹⁰⁵ See 1.1.3.

¹⁰⁶ See 1.1.3.

¹⁰⁷ See 1.1.2.

sector.¹⁰⁸ The CMA did ‘...not consider there to be a systemic problem in the groceries market in how retailers present prices, concluding that problems are not occurring in large numbers across the whole sector and that generally retailers are taking compliance with legislation seriously to avoid such problems occurring’.¹⁰⁹ However, a further recommendation made by the CMA was:

‘Recommendation 6: The CMA recommends that retailers ensure the information they provide about their price match schemes is as clear and transparent as possible in terms and conditions, online FAQs and in store. In particular, consideration should be given to whether the information is sufficiently accessible and in plain English.’¹¹⁰

1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- Any national law provisions providing contractual consequences in case of breaches to the Unfair Commercial Practices Directive or national provisions on the avoidance of the contract e.g. in cases of usury or other immoral behaviour;

Initially the CPUTR 2008 did not give consumers specific rights of private redress; a position buttressed by the original version of Regulation 28 which provided that ‘[a]n agreement shall not be void or unenforceable by reason only of a breach of these Regulations.’ Instead a consumer wanting private redress from an unfair commercial practice had to fashion a remedy from pre-existing doctrines:

‘The Regulations concern public enforcement rather than private redress. They do not give consumers the right to start civil actions to obtain compensation or other remedies. Instead, consumers must rely on existing private law doctrines, such as the law of misrepresentation and duress.’¹¹¹

Yet such an exercise was not always straightforward.¹¹² To some extent this was the result of the law of misrepresentation being an amalgam of (i) common law, equity and statute (e.g. Misrepresentation Act 1967) and (ii) tort and contract law.¹¹³ However, there were wider issues. First, the concept of a misleading action under CPUTR is not necessarily the same as under the general law of misrepresentation.¹¹⁴ Secondly, there are limited remedies for misleading omissions under the general law of misrepresentation.¹¹⁵ Thirdly, there are particular limitations on the right to rescind including (i) the general unavailability of a right of partial rescission¹¹⁶ and (ii) uncertainty on how long a right of rescission lasts.¹¹⁷ Fourthly, there are difficulties in

¹⁰⁸ See <https://www.gov.uk/government/news/cma-receives-super-complaint-from-which?>

¹⁰⁹ See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)).

¹¹⁰ CMA, *Pricing Practices in the Groceries Market Response to a super-complaint made by Which? on 21 April 2015* (2015) at 8.15.

¹¹¹ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii (referring to the original Regulations).

¹¹² ‘This is problematic: the law of misrepresentation is complex and uncertain...’ (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii); and on the various ways in which the misleading and aggressive practices concepts may be broader than traditional English private law doctrines like misrepresentation, duress and undue influence, see M. Koutsias and C. Willett, ‘The Unfair Commercial Practices Directive in the UK’ (2012) 5(4) *Erasmus Law Review*.

¹¹³ See, generally, Devenney, ‘Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence’, in Di Matteo, Rowley, Zhou & Santier, *Current Issues in Commercial Contracts: Transatlantic Perspectives* (Cambridge University Press, 2013) especially at pp.417-418.

¹¹⁴ See, for example, *OFT v. Purely Creative Ltd* [2011] EWHC 106 (Ch) where Briggs J. thought that the causation test was more onerous under the CPUTR 2008 than under the general law of misrepresentation.

¹¹⁵ See, for example, *Turner v. Green* [1895] 2 Ch 205.

¹¹⁶ See, generally, J. Poole and A. Keyser, *Justifying Partial Rescission in English Law* [2005] 121 LQR 273.

¹¹⁷ Cf. also Law Commission, *Consumer Remedies for Faulty Goods* ((2009) Law Com 317).

the assessment of damages for misrepresentation¹¹⁸ including possibly the types of losses a consumer might be able to claim.¹¹⁹ Finally, there are issues surrounding the ability and willingness of a consumer to bring an action.

Similarly a consumer who has been subject to aggressive practices under the CPUTR 2008 might be able to fashion a private remedy from, for example, the general law of duress and/or undue influence (usually rescission). Yet these doctrines were/are not unproblematic in this context:

'...the present private law provides only patchy and inadequate safeguards against aggressive practices. The doctrines of duress and undue influence are ill-fitted to deal with high-pressure sales techniques used to exploit consumers. Furthermore, the law of unconscionable bargains is too uncertain to deliver effective consumer protection. Finally, the Protection from Harassment Act 1997 can be useful protection against a course of conduct, but does not usually apply to one-off incidents.'¹²⁰

The foregoing resulted in calls for reform, especially against the backdrop of the strain on the public purse post-financial crisis:

'In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations. They pointed out that scams are all too common but relatively few prosecutions are brought. They thought that enforcement would be more effective if public authorities and consumers 'worked in tandem', using both private and public enforcement sanctions.'¹²¹

The Consumer Protection (Amendment) Regulations 2014 (CPAR 2014) inserted a new Part 4A into CPUTR 2008 giving consumers specific private rights of redress in relation to the CPUTR 2008: the remedies are the unwinding of a contract, a discount and damages. This is part of a significant overhaul of consumer law in the UK.¹²² Consumers are given these private redress rights in relation to misleading actions and aggressive practices but not specifically misleading omissions.¹²³ Generally, and subject to rules on double recovery, these remedies operate in addition to existing possibilities for private redress under the general law.¹²⁴

Unfortunately the CPAR 2014 is not a model of clarity in drafting. Regulation 27A is the gateway into the new provisions, setting out three preliminary conditions for the rights in Part 4A to be engaged. First, there must be a particular transaction involving a consumer. The relevant transactions are set out in Regulation 27A(2):

'(a) the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a 'business to consumer contract'),

¹¹⁸ See J. Poole & J. Devenney, *Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles* [2007] *Journal of Business Law* 269-305.

¹¹⁹ Generally damages for disappointment and distress are not available in the Contract Law of England and Wales. However, in an action for misrepresentation damages for such losses may be available, at least for fraudulent misrepresentation: see *Archer v. Brown* [1985] Q.B. 401. See, generally, H. McGregor, *McGregor on Damages*, (19th edn., Sweet & Maxwell, London, 2014) para. 5-012.

¹²⁰ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 3.51. In deed in *Niersmans v. Pesticcio* [2004] EWCA Civ 372 at [2] Mummery L.J. lamented: '...The striking feature of this appeal is that fundamental misconceptions [about the doctrine of undue influence] persist, even though the doctrine is over 200 years old and its basis and scope were examined by the House of Lords in depth...less than 3 years ago in the well-known case of ...Etridge (No.2)... The continuing confusions matter. Aspects of the instant case demonstrate the need for a wider understanding, both in and outside the legal profession, of the circumstances in which the court will intervene to protect the dependant and the vulnerable in dealings with their property.'

¹²¹ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii.

¹²² See, in particular, the Consumer Rights Act 2015, the aims of which were: to streamline consumer rights; to clarify aspects of consumer law; to modernise consumer law, particularly for the digital age; to deregulate for businesses; and to selectively enhance consumer protection in the UK.

¹²³ CPUTR 2008, Regulation 27B.

¹²⁴ See CPUTR 2008, Regulation 27L but cf. *Misrepresentation Act 1967* s.2(4).

(b) the consumer enters into a contract with a trader for the sale of goods to the trader (a 'consumer to business contract'), or

(c) the consumer makes a payment to a trader for the supply of a product (a 'consumer payment').'

The second condition is that the trader (or possibly the producer¹²⁵) engages in a prohibited practice (viz., for these purposes, a misleading action or aggressive practice). The third condition is that the prohibited practice is a 'significant factor' in the consumer entering the contract or making the relevant payment.¹²⁶

The remedy of unwinding is contained in the (amended) CPUTR 2008, Regulations 27E-H, with Regulations 27E-F dealing with business to consumer contracts.¹²⁷ The consequences of unwinding are that the contract comes to an end, the trader may have to give the consumer a refund and the goods must be made available for collection by the trader.¹²⁸ Under 27E(1) unwinding is available '...if the consumer indicates to the trader that the consumer rejects the product, and does so (a) within the relevant period [90 days], and (b) at a time when the product is capable of being rejected.' Regulation 27E(8) provides:

'...a product remains capable of being rejected only if—

(a) the goods have not been fully consumed,

(b) the service has not been fully performed,

(c) the digital content has not been fully consumed,

(d) the lease has not expired, or

(e) the right has not been fully exercised...'

Significantly a consumer is generally not required to account for use of the product:¹²⁹

'We believe that in most cases, requiring an allowance for use would remove the simplicity and usefulness of the remedy. Any over-compensation would be limited because the complaint must be made within three months. Given that the trader has acted in a misleading or aggressive way, this is not wholly inappropriate.'¹³⁰

In terms of the remedy of a discount Regulation 27L(1) provides:

'A consumer has the right to a discount in respect of a business to consumer contract if—(a) the consumer has made one or more payments for the product to the trader or one or more payments under the contract have not been made, and (b) the consumer has not exercised the right to unwind in respect of the contract.'

¹²⁵ 'The second condition is that—

(a) the trader engages in a prohibited practice in relation to the product, or

(b) in a case where a consumer enters into a business to consumer contract for goods or digital content—

(i) a producer engages in a prohibited practice in relation to the goods or digital content, and

(ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.'

¹²⁶ Regulation 27A(6) provides: 'The third condition is that the prohibited practice is a significant factor in the consumer's decision to enter into the contract or make the payment.'

¹²⁷ See above: 'a contract with a trader for the sale or supply of a product by the trader'. Regulations 27G and 27H deal respectively with the unwinding of a consumer to business contract and a consumer payment.

¹²⁸ Regulation 27F(1): 'Where a consumer has the right to unwind in respect of a business to consumer contract—(a) the contract comes to an end so that the consumer and the trader are released from their obligations under it, (b) the trader has a duty to give the consumer a refund (subject as follows), and (c) if the contract was wholly or partly for the sale or supply of goods the consumer must make the goods available for collection by the trader.'

¹²⁹ Cf. Regulation 27F(7) in relation to, for example, continuous contracts such as some utility contracts.

¹³⁰ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 8.91.

The (amended) CPUTR 2008 also provide a, fairly crude, sliding scale of the quantum of discounts.¹³¹ In terms of damages, which is of course an established remedy for misrepresentation in England and Wales,¹³² significantly a consumer is given the right to claim damages for 'alarm, distress or physical inconvenience or discomfort' subject to a remoteness test.¹³³ Unlike the other remedies, there is a due diligence defence (s27J(5)(b): 'the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice').

- Any case law (enforcement decisions, court rulings) providing for such consequences;

This has been covered under the last item.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

As a result of the CPAR 2014 the UK now has specific private law remedies for some unfair commercial practices. Yet these remedies, which largely operate alongside remedies under the general law, have added complexity to this area of consumer law, not least as a result of the legislative drafting. Indeed, with concerns about fragmentation in mind, there is an argument that these reforms should have been absorbed into the Consumer Rights Act 2015. Moreover there are significant continuing issues around the ability and willingness of consumers to make full use of such remedies¹³⁴ as well as issues of consumer education; and it is ultimately those issues which may dull the potency of these reforms.

¹³¹ Regulation 27I (4): 'Subject to paragraph (6), the relevant percentage is as follows—

- (a) if the prohibited practice is more than minor, it is 25%,
- (b) if the prohibited practice is significant, it is 50%,
- (c) if the prohibited practice is serious, it is 75%, and
- (d) if the prohibited practice is very serious, it is 100%.'

Regulation 27I(6) concerns products where the contract price exceeds £5,000.

¹³² There is some authority that damages (or a similar remedy) may be awarded for undue influence and/or duress: see *Mahoney v Purnell* [1996] 3 All E.R. 61 and Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 3.57.

¹³³ Regulation 27J (1): 'Subject as follows, a consumer has the right to damages if the consumer—

- (a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or
 - (b) has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place.
- (2) The right to damages is the right to be paid damages by the trader for the loss or the alarm, distress or physical inconvenience or discomfort in question.
- (3) The right to be paid damages for financial loss does not include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract.
- (4) The right to be paid damages under this regulation is a right to be paid only damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice'.

¹³⁴ Cf. H.G. Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in J Beatson & D Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995, Clarendon, Oxford) on the importance of collective measures.

1.2. Contract conclusion and performance

1.2.1. Effectiveness of the current rules in establishing a high level of consumer protection

What is the effectiveness of the UCTD (i.e. the national laws transposing it) in terms of:

- The overall effectiveness of the principle-based approach under this Directive;

It is not clear that the main focus of the UCTD is on establishing a high level of consumer protection;¹³⁵ nor is it clear that a high level of consumer protection necessarily, or at least proportionately, contributes to increased consumer participation in the internal market.¹³⁶ Nevertheless it is clear that the regulation of terms in consumer contracts contributes to the level of consumer protection in any legal system.¹³⁷ Prior to the transposition of the UCTD in the UK, terms in consumer contracts were 'policed' in a number of ways in the UK. Thus terms in consumer contracts were regulated, for example, through approaches to interpretation,¹³⁸ principles of incorporation¹³⁹ and the rule against penalty clauses.¹⁴⁰ Parliament had also made provision for the regulation of terms in consumer contracts, most notably through the Unfair Contract Terms Act 1977 (UCTA 1977). In general terms, UCTA 1977 regulated exclusion/limitation clauses¹⁴¹ in certain consumer and non-consumer contracts.¹⁴² In relation to consumer contracts under UCTA 1977 some clauses were automatically rendered unenforceable¹⁴³ whilst others were rendered unenforceable if unreasonable.¹⁴⁴ The technique of automatically rendering some clauses unenforceable may have advantages¹⁴⁵ in terms of consumer protection but it also has

¹³⁵ See, generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

¹³⁶ It may, for example, place too much burden on smaller businesses. Cf. Press Release IP/11/1175 (on the then proposed Common European Sales Law): 'On October 11th 2011, the European Commission proposed an optional Common European Sales Law will help break down these barriers and give consumers more choice and a high level of protection. It will facilitate trade by offering a single set of rules for cross-border contracts in all 27 EU countries. If traders offer their products on the basis of the Common European Sales law, consumers would have the option of choosing a user-friendly European contract with a high level of protection with just one click of a mouse. ...'

¹³⁷ Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2nd. Edn., Hart Publishing, 2007) Ch. 4.

¹³⁸ See, for example, *Houghton v. Trafalgar Insurance Co* [1954] 1 QB 247.

¹³⁹ See, for example, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433. See, for example, p.445 where Bingham LJ stated: 'The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants... In my opinion the plaintiffs did not do so... The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.'

¹⁴⁰ See, for example, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 but note the recent consideration of that case by the Supreme Court in *Makdessi v Cavendish Square Holdings BV; ParkingEye Ltd v Beavis* [2015] UKSC 67.

¹⁴¹ Note the expanded definition of relevant clauses in s.13, UCTA 1977.

¹⁴² Note s.12 on 'dealing as consumer'.

¹⁴³ See, for example, S.2(1), UCTA 1977: 'A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.'

¹⁴⁴ See, for example, S.3, UCTA 1977 [pre-Consumer Rights Act 2015 version]: '(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contract term— (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled— (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'

¹⁴⁵ Cf. C. Scott & J. Black, *Cranston's Consumers and the Law* (3rd edn., Butterworths, 2000) at 96.

disadvantages.¹⁴⁶ The UCTD's principle-based approach is arguably more suitable for applying to a wide range of contractual terms¹⁴⁷ although, as will be noted below, it also presents challenges in interpretation/application.¹⁴⁸ The UK initially¹⁴⁹ transposed the UCTD alongside UCTA 1977, thus arriving at a blend of a principle-based approach¹⁵⁰ and a rule-based approach.¹⁵¹ Thereafter the Consumer Rights Act 2015 (CRA 2015)¹⁵² introduced significant structural reform in this area of law in the UK. In particular, UCTA 1977 was essentially confined to non-consumer cases;¹⁵³ and the UTCCR 1999 were repealed and replaced by a regime for 'policing' terms in consumer contracts in Part 2 of the CRA 2015. Significantly the latter regime includes a blend of principle-based approaches¹⁵⁴ and rule-based approaches.

- The practical effectiveness of the indicative list of unfair terms annexed to the Directive, in particular its application in practical cases; [*Key aspects to consider are: How is the indicative list of the Directive interpreted in your MS? Does this work in practice or are there problems?*]

The UTCCR 1999 essentially replicated in Schedule 2 the indicative list from the Annex of the UCTD (sometimes referred to as a 'grey' list). The Office of Fair Trading (OFT) and now the Competition and Markets Authority have made use of the indicative list in their guidance¹⁵⁵ and enforcement activity.¹⁵⁶ In so doing there was, at times, evidence of an expansive approach.¹⁵⁷ Moreover it seems that, following the bank charges litigation,¹⁵⁸ the grey list has gained greater prominence.¹⁵⁹ The relevant case

¹⁴⁶ See Law Commission, Report No 69, *Second Report on Exemption Clauses in Contracts*, 1975, para 58: 'It may still be said, however, that although a complete ban on exemptions from liability for negligence applicable to consumer and commercial transactions alike cannot be justified, there should be a complete ban in relation to consumer transactions. The arguments advanced in favour of this proposal are that the private consumer is at a serious disadvantage in the matter of bargaining power since normally he has no alternative but to accept the terms and conditions of a standard form contract imposed on him by a monopolistic or near-monopolistic industry; and that he is less likely to be insured than is a person receiving the service in the course of his business. Our Working Party rejected this proposal as being too rigid and in our joint document we agreed with their conclusion. There are many situations in which the arguments in support of the proposal should prevail, but we are convinced from the evidence we have summarised in the two preceding paragraphs that there are also situations in which such a ban would not operate to the advantage of consumers. Suppliers are not all monopolists; monopolists do not always insist on using standard forms of contracts which they will not vary; customers are sometimes given a choice between accepting the risk of loss and paying a lower rate for the service or paying a higher rate and leaving the risk with the supplier. In any event, where the liability in question is liability for death or personal injury the distinction between 'commercial' and 'consumer' transactions is irrelevant. In our view it would not be right to recommend a complete ban on exclusion or restriction of liability for negligence in all consumer transactions.'

¹⁴⁷ Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431.

¹⁴⁸ See 1.2.2.

¹⁴⁹ Unfair Terms in Consumer Contract Regulations 1994 (1994/3159), later replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (1999/2083).

¹⁵⁰ For example, under UTCCR 1999, Regulation 5.

¹⁵¹ For example, under UCTA 1977, s.2(1).

¹⁵² The relevant provisions of the Consumer Rights Act 2015 came into force on 1 October 2015 (see Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015/1630) and do not have retrospective effect.

¹⁵³ See Consumer Rights Act 2015, Schedule 4 paras 2-27.

¹⁵⁴ S.62(4) provides: '(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'

¹⁵⁵ See, for example, CMA, 'Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (CMA37 (2015)), p.63ff.

¹⁵⁶ See, for example, OFT, *Unfair Contract Terms Guidance*, (OFT311, (2008)).

¹⁵⁷ For example, in relation to exclusion or limitation clauses under paragraphs (a), (b) or (q). See OFT, 'Unfair Terms Guidance' (OFT311 (2008)) para. 1.5: 'If a term achieves the same effect as an unfair exemption clause, it will be unfair whatever its form or mechanism. This applies, for instance, to terms which 'deem' things to be the case, or get consumers to declare that they are-whether they really are or not-with the aim of ensuring no liability arises in the first place.'

¹⁵⁸ *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

law demonstrates the role of interpretation of the relevant contract term(s) as a precursor to the application of the unfairness test, with or without reference to the indicative list.¹⁶⁰ The (now) Court of Justice of the EU (CJEU) has, of course, developed a jurisprudence around the 'grey' list. Thus in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*¹⁶¹ the ECJ noted that:

'If the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term.'¹⁶²

That case, in effect, involved a provision which allowed the trader to vary the fees charged for a service (telephone services).¹⁶³ It thus touched upon paragraphs 1(j) and 1 (l) of the 'grey' list as well as paragraphs 2(b) and 2(d).¹⁶⁴ The ECJ, after referring to Article 5 of the UTCD (plain intelligible language requirement) concluded:

'Moreover, as is clear from the 20th recital in the preamble to the Directive, the consumer should actually be given an opportunity to examine all the terms appearing in the GBC and the consequences of those terms. Further, the obligation to draft terms in clear, intelligible language is laid down in Article 5 of the Directive... Consequently, in the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC with regard to the fees connected to the service to be provided is of fundamental importance.'¹⁶⁵

There is some doubt whether or not some of the relevant case law in the UK¹⁶⁶ is sufficiently in tune with this ruling from the ECJ (the consumer being able to foresee the amendments), although that case law did pre-date this ECJ ruling.¹⁶⁷

¹⁵⁹ See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 5.3.

¹⁶⁰ See, for example, *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) at [12].

¹⁶¹ (C-472/10) April 26, 2012.

¹⁶² Cf. *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch) at [49] per Gabriel Moss QC "It follows from the judgment of the European Court of Justice [in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (C237/02) April 1, 2004] that even if Mr Bastin is correct in locating the present provision both within Schedule 2, paragraph 1(j) as a typically unfair provision but yet one which is not to be regarded as typically unfair by reason of Schedule 2, paragraph 2(b) , this takes the matter no further forward and is of no assistance to him."

¹⁶³ See *Nemzeti* at [17].

¹⁶⁴ "(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract...

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded...

2. Scope of subparagraphs (g), (j) and (l)...

(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described."

¹⁶⁵ [27]-[28].

¹⁶⁶ In particular, *Du Plessis v. Fontgary Leisure Parks Ltd* [2012] EWCA Civ 409.

Prior to the Consumer Rights Act 2015, the Law Commission gave further advice to the Government in 2013 on the regulation of unfair terms in consumer contracts.¹⁶⁸ In 2005 the Law Commission had recommended the rewriting of the 'grey list' in clearer terms.¹⁶⁹ However, in its advice to the Government in 2013 advising against this course of action, not least on the grounds of the risk of wrongly implementing the UCTD.¹⁷⁰ The CRA 2015 does, however, make some minor adjustments in drafting to the 'grey' list (for example using the term 'trader' instead of 'seller or supplier') and there are some additions to the list.¹⁷¹ The CRA 2015 also provided two further important clarifications: (i) terms listed on the 'grey' list will not be excluded from an assessment of fairness by the exclusion in Article 4(2) of the UCTD;¹⁷² and (ii) the terms listed in Part 2 of Schedule 2 (this qualifies the list in Part 1 of Schedule 2) are assessable for fairness.¹⁷³

- Whether the "black" and/or "grey" list of unfair contract terms adopted in certain Member States represent an advantage for consumer protection compared to the purely indicative list of the Directive; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The 'black' listed terms, and the advantages/disadvantages of such a technique, have been discussed above.¹⁷⁴ Which? noted: 'A clear prohibition against certain terms not only assists consumers and traders in understanding what is acceptable, it also allows for swift enforcement in clear-cut cases...The Commission should look across the black lists implemented by Member States and ensure that such prohibitions - derived from years of practical experience - are not lost.' Above the extended 'grey' list under the CRA 2015 has been noted. Two further points need to be made here. First, s.63(3)-(5) of the CRA 2015 gives the Secretary of State the power to amend (including adding to) the 'grey' list. Secondly, the OFT compiled a list, based on its experience, of terms likely to be unfair¹⁷⁵ and this has been adopted by the CMA.¹⁷⁶ At one level, and

¹⁶⁷ See H. Beale (ed.), Chitty on Contracts, (32nd Edn, Sweet & Maxwell, London, 2015) para. 38-288: 'Although the Court of Justice's guidance in *Invitel* was given in the context of a different type of consumer contract and a different type of variation clause, it is submitted that, had the Court of Appeal in *Du Plessis v Fontgary Leisure Parks Ltd* the benefit of the guidance given by the Court of Justice in *Invitel*, it might have reached a different conclusion on the fairness of the tariff review clause before it in that case. For, while the circumstances taken into account by the Court of Appeal would still have argued in favour of the fairness of the term, it could have been argued that the term which provided for an increase in the fee payable by the caravan owner (the consumer) having regard to 'any other relevant factor' (even though it describes the method of variation explicitly) did not allow the caravan owner 'to foresee, on the basis of clear, intelligible criteria, the amendments' of the fees, a possibility which the Court of Justice in *Invitel* considered to be of 'fundamental importance'.'

¹⁶⁸ Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (March 2013).

¹⁶⁹ Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 3.116.

¹⁷⁰ See 5.41.

¹⁷¹ Additions to the list since the UTCCR 1999 are: 'A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied' (5); 'A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it' (12); and 'A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound' (14).

¹⁷² S.64(6).

¹⁷³ S.63(2).

¹⁷⁴ See, for example, 1.1.1.

¹⁷⁵ See OFT, 'Unfair Contract Terms Guidance' (OFT311 (2008)) at [18].

¹⁷⁶ See <https://www.gov.uk/government/publications/unfair-contract-terms-guidance--2>. Note also the view of Which? to the effect: 'Similarly, many Member States have supplemented the Annex to the UCTD with additional grey list terms in response to emerging practices either across markets or within specific sectors. This experience should be captured in any update to the UCTD and, in our view, Member States should remain free to add terms to national grey lists where serious problems are identified which are specific to a local market or national jurisdiction.'

subject to the comments above in respect of the approach to the 'grey' list, it can be argued that this is an advantage for consumer protection. The UK European Consumer Centre noted: 'this assists judges in courts, as well as helps the authorities and some more savvy consumers to formulate arguments in disputes.' Yet the extent to which most consumers are aware of formal or more informal 'grey' lists is debatable.¹⁷⁷ The Department for Business, Energy and Industrial Strategy commented to us:

'In general, the UK's preference is for grey lists rather than black lists which we view as potentially less effective because black lists can reduce flexibility for enforcers.'¹⁷⁸

- The effects of limiting a court decision establishing the unfairness of an unfair term to the individual relationship between the specific trader and the consumer, rather than, for example, extending the effect of such court decision to all contracts concluded with a given trader, even outside injunctions under Article 7(2) of the Directive, or to all contracts containing the same contract term; [*Key aspects to consider are: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

S.62(1) of the CRA 2015 provides that an unfair term is not binding on the consumer.¹⁷⁹ Such a finding may, broadly, also impact on other consumers either through the doctrine of precedent¹⁸⁰ or through its impact on CMA formal and more informal enforcement activity.¹⁸¹ Yet whether or not a finding that a particular term is unfair in a dispute between a consumer and a trader should impact more directly on the terms in like, or similar, contracts is more debatable. The circumstances of individual cases may differ materially¹⁸² and so a non-rebuttable presumption of unfairness in other cases involving like or similar terms might be regarded as 'unfair' to the trader. Yet similar challenges arise when, for example, the CMA seeks a preventative injunction. The Court of Appeal in *OFT v. Foxtons Ltd*¹⁸³ confirmed that, although preventive proceedings do not generally bind subsequent individual proceedings by way of *res judicata*,¹⁸⁴ such an injunction can cover existing as well as future contracts.¹⁸⁵ In such cases the drafting of the injunction against the trader will be crucial.¹⁸⁶

¹⁷⁷ Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2nd Edn, Hart Publishing, 2007) at p.510.

¹⁷⁸ 11 August 2016.

¹⁷⁹ Note s.62(3): 'This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.' Cf. *Mayhook v. National Car Parks*, unreported, November 29, 2012 where, surprisingly, the UTCCR 1999 affected the position of a third party (the owner, not the driver, of a car).

¹⁸⁰ See, for example, in the context of UCTA 1977 *RÖHLIG (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18 at [23] per Moore-Bick LJ: 'In principle the question must be considered separately in each case because the circumstances surrounding the contract may differ from case to case, but where a standard condition of this kind is involved I do not think that the court should be astute to draw fine distinctions between cases that in broad terms are very similar. It is important for those engaged in any commercial activity, whether as providers of goods or services or as customers, to know whether a particular clause will generally be regarded as reasonable in the context of contracts of a routine kind made between commercial parties.'

¹⁸¹ See *OFT, Unfair Contract Terms Guidance*, (OFT311, (2008)).

¹⁸² Cf. s.62(5)(b).

¹⁸³ [2009] EWCA Civ 288.

¹⁸⁴ *Ibid.* at [71].

¹⁸⁵ See [43]-[44].

¹⁸⁶ See [71].

- The overall effectiveness of the contractual transparency requirements under the Directive;

Regulation 7 of the UTCCR 1999, following closely the language of Article 5 of the UCTD,¹⁸⁷ provided:

‘(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.’

A number of issues arose in connection with Article 5 of the UCTD and its transposition in the UK by Regulation 7 of the UTCCR 1999. First, did the requirement of plain, intelligible language extend to, for example, legibility and availability?¹⁸⁸ Recital 20 and case law of the (now) CJEU¹⁸⁹ suggested that this was so. Secondly, what were the consequences of a lack of transparency beyond, in effect, the *contra proferentem* rule in Regulation 7(2)? For example could a lack of transparency itself found a claim for unfairness under the UCTD (as has been suggested in some Member States¹⁹⁰)? Thirdly, could enforcement bodies act on the basis of a breach of Regulation 7?¹⁹¹ Finally, what was the precise relationship between the transparency requirements and Article 4(2)¹⁹² of the UCTD?¹⁹³

The CRA 2015 attempted to tackle some of these uncertainties. First, s.68(1) requires written terms in consumer contracts to be ‘transparent’. The concept of transparency in respect of contractual terms is mapped in s.64(3): ‘A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.’¹⁹⁴ This seems to better map the contours of the UCTD as interpreted by the (now) CJEU¹⁹⁵ although the standard to be applied in assessing those concepts is not, at least explicitly, clear in the CRA 2015.¹⁹⁶ Secondly, although the Law Commission stopped short of recommending that a lack of transparency always renders the term in question unfair,¹⁹⁷ CMA guidance places

¹⁸⁷ ‘In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.’

¹⁸⁸ See Law Commission, ‘Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills’ (2013) at 6.60: ‘We have considered whether the legislation should specify that terms may be unfair principally or solely because they are not transparent. Given the strong arguments put by many consultees in favour of keeping the current fairness test, we have decided not to make this change. We think that the courts will be strongly influenced by the fact that terms are not transparent, but the fairness test must take account of ‘all the circumstances attending the conclusion of the contract.’ We would not wish to suggest that non-transparent terms are almost always unfair.’

¹⁸⁹ See, for example, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) [2013] 3 C.M.L.R. 10.

¹⁹⁰ See EC Commission, ‘Report on the Implementation of Directive 93/13/EEC on unfair terms in consumer contracts’ (COM (2000) 248 final) at p.18.

¹⁹¹ The Law Commission thought so on the basis, *inter alia*, of the Injunctions Directive (Directive 98/27/EC on injunctions for the protection of consumers’ interests, OJ 1998 L 166/51 which was replaced by a codifying Directive (Directive 2009/22/EC, OJ 2009 L 110/30)): see Law Commission, ‘Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills’ (2013) at 6.54.

¹⁹² ‘Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language’.

¹⁹³ Cf. *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

¹⁹⁴ Note also s.69: ‘If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.’

¹⁹⁵ *Quaere*: whether this revised formulation reflects the full reach of the (now) CJEU jurisprudence (cf. *Kásler v OTP Jelzálogbank Zrt* (C-26/13) [2014] 2 All E.R. (Comm) 443 (link to understanding)).

¹⁹⁶ Cf., for example, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) [2013] 3 C.M.L.R. 10.

¹⁹⁷ See Law Commission, ‘Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills’ (2013) at 6.5.

emphasis on the link between 'good faith' and transparency.¹⁹⁸ On the other hand the CMA note that transparency is not, alone, sufficient to render a term 'fair'.¹⁹⁹ Thirdly, s.70(1) of the CRA 2015 confirms that enforcement bodies can act on the basis of a breach of s.68(1).

- Whether the extensions of the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) put in place in certain Member States represent an advantage for consumer protection. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Three aspects of the transposition of the UCTD in the UK should be highlighted at this point. First, unlike the UTCCR 1999, the test of unfairness in the CRA 2015 is not limited to, in effect, standard form contracts. The significance of this should not, however, be over-estimated as consumers will normally in fact be dealing on standard terms.²⁰⁰ Secondly, as alluded to above, under the CRA 2015, the CMA (and other Regulators) are able to enforce Part 2 of the Act.²⁰¹ Schedule 3 provides a framework for this type of enforcement action and applies to:

- '(a) a term of a consumer contract,
- (b) a term proposed for use in a consumer contract,
- (c) a term which a third party recommends for use in a consumer contract, or
- (d) a consumer notice.'²⁰²

The CMA, or other Regulator, is able to bring an application for an injunction (or interdict in Scotland) in relation to 'the use, proposing or recommending'²⁰³ of a relevant term or notice.²⁰⁴ Significantly, however, this power extends to terms or notices which are prohibited without the need to assess fairness (which relate, in particular, to sections of the Act which broadly replicate some of the more protection consumer provisions formerly found in UCTA 1977):

'A term or notice falls within this sub-paragraph if it purports to exclude or restrict liability of the kind mentioned in—

- (a) section 31 (exclusion of liability: goods contracts),
- (b) section 47 (exclusion of liability: digital content contracts),

¹⁹⁸ 'In order to achieve the openness required by good faith, terms should be 'expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously' to the consumer. Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention': CMA, 'Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (July 2015) para. 2.22. The UK European Consumer Centre noted: 'Provisions are sufficient, [but] in some cases more education aimed at businesses may be required.'

¹⁹⁹ '...[O]penness is not enough on its own, since good faith relates to the content of terms as well as the way they are expressed. Fair dealing has been authoritatively said to require that, in drafting and using contract terms, a trader 'should not, whether deliberately or unconsciously, take advantage' of the consumers' circumstances to their detriment...The CMA considers the CJEU's approach demonstrates that businesses need, in formulating their contract terms, not just to resist the temptation to take advantage, but actively to take the legitimate interests of the consumer into account': CMA, 'Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (July 2015) para. 2.23ff.

²⁰⁰ Cf. F. Kessler, 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 Columbia L Rev 629.

²⁰¹ See s.70. In relation to investigatory powers see Schedule 5 which enhances the powers under the UTCCR 1999.

²⁰² Schedule 3, para 1.

²⁰³ Schedule 3, para 3.

²⁰⁴ This power is significant in terms of the CMA or other Regulator obtaining 'undertakings' instead of seeking an injunction etc. - see Schedule 3, para 6.

- (c) section 57 (exclusion of liability: services contracts), or
- (d) section 65(1) (business liability for death or personal injury resulting from negligence).²⁰⁵

This power also now extends to individually negotiated terms and to consumer notices,²⁰⁶ neither of which was, at least clearly, required by the Unfair Terms Directive.

The public enforcement provisions in the Act are, in fact, part of tapestry of public enforcement provisions relevant to the regulation of unfair terms. In addition to the provisions under the Act, it is possible to take public enforcement action under Part 8 of the Enterprise Act 2002 (which relates, in particular, to infringements of Community legislation)²⁰⁷ and under the Consumer Protection from Unfair Trading Regulations 2008.²⁰⁸ The later provisions, or more accurately the Directive which gave rise to those Regulations, cause some difficulty in respect of the new provisions under the CRA 2015 which need to be explored at this point. The Consumer Protection from Unfair Trading Regulations 2008 ('CPUTR 2008') largely transpose the Unfair Commercial Practices Directive²⁰⁹ into the UK. The CPUTR 2008, which replaced 23 earlier enactments, closely follow the wording of the Directive.²¹⁰ A commercial practice is defined widely as:

'...any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product'.²¹¹

Moreover in *R v. X Ltd*²¹² the Court of Appeal confirmed that isolated incidents can constitute a commercial practice. Regulation 3(3)-(4) sets out when a commercial practice will be regarded as an unfair commercial practice:

- '(3) A commercial practice is unfair if—
 - (a) it contravenes the requirements of professional diligence; and
 - (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.
- (4) A commercial practice is unfair if—
 - (a) it is a misleading action under the provisions of regulation 5;

²⁰⁵ Schedule 3, para 3(2).

²⁰⁶ Cf. H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-392.

²⁰⁷ S.212 of the Enterprise Act 2002 provides: 'In this Part a Community infringement is an act or omission which harms the collective interests of consumers and which—(a) contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State...(b) contravenes such laws, regulations or administrative provisions which provide additional permitted protections, (c) contravenes a listed Regulation, or (d) contravenes any laws, regulations or administrative provisions of an EEA State which give effect to a listed Regulation. (2) The laws, regulations or administrative provisions of an EEA State which give effect to a listed Directive provide additional permitted protections if—(a) they provide protection for consumers which is in addition to the minimum protection required by the Directive concerned, and (b) such additional protection is permitted by that Directive.' S.79 of the Consumer Rights Act 2015 enhances the measures that can be taken under Part 8 of the Enterprise Act 2002 and includes '(a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking, (b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract, (c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers' (the new s219A, Enterprise Act 2002).

²⁰⁸ SI 2008/1277.

²⁰⁹ Directive 2005/29/EC, OJ L149/22.

²¹⁰ See, generally, H.G. Beale (ed.), *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) para. 38-145ff.

²¹¹ Regulation 2.

²¹² [2013] EWCA Crim 818.

- (b) it is a misleading omission under the provisions of regulation 6;
- (c) it is aggressive under the provisions of regulation 7; or
- (d) it is listed in Schedule 1.'

For present purposes the key point is that the use of 'unfair terms' might be regarded as an unfair commercial practice under the CPUTR 2008 and, therefore, attract the public enforcement regime under those Regulations.²¹³ The difficulty is that the Unfair Commercial Practices Directive was a maximum harmonisation directive and, therefore within the scope of the Directive (and paying due regard to any exceptions in the Directive), Member States are not permitted to go beyond the protection provided by the Directive. Thus it is arguable²¹⁴ that some of those aspects of the CRA 2015 which go beyond the scope of the Unfair Terms Directive with regard to public enforcement fall foul of the maximum harmonisation clause in the Unfair Commercial Practices Directive.²¹⁵ For example, some terms (e.g. those mentioned in Schedule 3, para. 3(2)) are always prohibited and made subject to public enforcement under the CRA 2015. This is so whether or not an unfair commercial practice has been established for the purposes of the CPUTR 2008. In other words the protection extends beyond both directives and, arguably, conflicts with the maximum harmonisation nature of the Unfair Commercial Practices Directive²¹⁶ – an example, perhaps, of the unintended consequences of this consolidation.

Finally the CRA 2015 provides:

- '(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
 - (a) it specifies the main subject matter of the contract, or
 - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.'

This provision is, of course, an evolution of the UTCCR 1999, Regulation 6(2). In, at least, two respects s.64(1)(b) appears to reinforce aspects of *Office of Fair Trading v. Abbey National Plc.*²¹⁷ First, s.64(2) states that '[s]ubsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent' which chimes with the analysis of *Office of Fair Trading v. Foxtons*²¹⁸ by the Supreme Court in *Office of Fair Trading v. Abbey National Plc.* Secondly, s.64(1)(b) clearly inclines to Lord Walker's view that only *monetary* payment terms are caught by Article 4(2) of the Directive.²¹⁹ Yet the bigger issue is whether the controversial reading of the exclusions from the test of unfairness Article 4(2) of the Directive by the Supreme Court in *Office of Fair Trading v. Abbey National Plc* should be used in relation to s.64(1)(b) of the Consumer Rights Act 2015.

²¹³ See, for example, *Office of Fair Trading v. Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch).

²¹⁴ Cf. H.G. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-393 for a possible contrary argument in relation to Directive 2009/22/EC on injunctions for the protection of consumers' interests, [2009] O.J. L110/30.

²¹⁵ Article 4.

²¹⁶ Unless it can be argued that the public enforcement regime in the CRA 2015 is contract law under Recital (9) of the Unfair Commercial Practices Directive: 'Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to community competition rules and the national provisions implementing them...'

²¹⁷ [2009] UKSC 6.

²¹⁸ [2009] EWHC 1681. See above at 29.

²¹⁹ S.64(1)(b) is framed in terms of: '...the price payable under the contract...'

On the one hand, the legislative history of s.64 suggests an intention that such an approach should be retained. More specifically s.64 can be traced back to the Law Commission's advice that the issues surrounding the impact of *Office of Fair Trading v. Abbey National Plc* could be dealt with by the use of transparency and prominence requirements (rather than reverting to a previous interpretation of provisions transposing Article 4(2)):

'price or main subject matter terms should be exempt from review only if they are transparent and prominent. Both approaches distinguish between the terms which consumers take into account in their decision to buy the product and those which become lost in small print. The emphasis on prominence, however, offers a practical way of distinguishing between a headline price and other charges. It also emphasises that whether a term is exempt is within the control of the trader.'²²⁰

Leaving aside the concepts of transparency and prominence this approach creates a number of problems. First, as the Law Commission recognised, it is far from clear that such an approach is in conformity with EU Law:

'We think that the words of the judgment may be lulling some businesses into a false sense of security. There are other ways to interpret the judgment – and it could be overturned by the Court of Justice of the European Union (CJEU). The German Federal Supreme Court takes a different view on the UTD and has reviewed ancillary bank charges for fairness [...] In a world of price comparison websites, there is increasing pressure on traders to advertise low headline prices, whilst earning their profits through other charges. Given this potential undermining of competition, the law should provide effective tools to prevent abuse [...] The current uncertainty has the potential to damage businesses as well as consumers. If a business uses an ancillary price term to subsidise a low headline price, the business is put at risk if the term is later found to be unfair. It faces the substantial costs of litigation; the reputational damage to its business; the cost of repaying consumers; and the demise of its business model...we recommend that the exemption for subject matter and price should be reformed. The current law is unacceptably uncertain. It requires significant legal expertise to navigate, and even then the outcome is unpredictable. Both consumers and traders may suffer from this uncertainty.'²²¹

Indeed subsequent judgments of the CJEU have cast more suspicion on the appropriateness of the approach in *Office of Fair Trading v. Abbey National Plc*. For example in *Kásler v. OTP Jelzálogbank Zrt*²²² the CJEU, in the context of a consumer credit agreement, held that a term which provided the exchange rate for the repayment of a loan in a foreign currency could be assessed for unfairness:

'in so far as it contains a pecuniary obligation for the consumer to pay, in repayment instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as 'remuneration', the adequacy of which as consideration for a service supplied by the lender cannot be subject of an examination as regards unfairness under Article 4(2).'²²³

Given the incomplete nature of the map left by the Supreme Court,²²⁴ it is not easy to compare the approach of the CJEU in *Kásler v. OTP Jelzálogbank Zrt* with the approach in *Office of Fair Trading v. Abbey National Plc*. Nevertheless the approach of the CJEU

²²⁰ Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.18.

²²¹ Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.18. Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.11-S.14.

²²² (C-26/13); [2014] 2 All E.R. (Comm) 443.

²²³ *Ibid.* at [59].

²²⁴ See, generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

does appear to be more nuanced than the rather more blunt focus on monetary terms by the Supreme Court.²²⁵ For this reason, it has been stated by one distinguished commentator:

'...that in these circumstances English courts should seek to give effect to the interpretation and guidance of the Court of Justice of the EU in their application of s.64(1)(b) of the 2015 Act following the principle of the conforming interpretation of UK legislation implementing EU directives, though the difficulty in doing so would be whether the English court would consider this 'possible' given the wording of s.64(1)(b) and its background in the Law Commissions' earlier Advice.'²²⁶

Moreover Which? argued: 'In our experience, the exemptions for price and other core terms in Article 4(2) have proved deeply problematic to apply in practice. We believe they add disproportionate complexity and uncertainty to the regime and should be removed...This significant loophole in the effectiveness of the UCTD needs to be closed. In our view, the exemptions are not in line with modern behavioural economic evidence and should be abolished.'

- The effectiveness of the sanction foreseen by the UCTD for unfair contract terms (term is not binding). [*Key aspects to consider are: How does this sanction work in practice? Does it help consumers? Do the national courts take up the active role imposed by the Court of Justice (invoking unfairness ex officio, taking measures of instruction)? Is it sufficient to have CJEU guidance in this regard? Is there administrative remedy in this area for consumers?*]

As noted above, s.62(1) of the CRA 2015 provides that an unfair term is not binding on the consumer. As is well known, the (now) CJEU placed a duty on national courts, in certain circumstances, to consider the fairness of a particular term of its own motion.²²⁷ Such a duty is, perhaps, a little unusual from the perspective of UK courts who, sometimes, adopted quite a technical, pleadings based approach to proceedings under the UTCCR 1999.²²⁸ Following a recommendation from the Law Commission,²²⁹ the CRA 2015 sought to 'codify' this duty with s.71 providing: a 'court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.'²³⁰ The extent to which courts will use this provision remains to be seen.²³¹

²²⁵ 'The services that banks offer to their current account customers are a comparable package of services. These include the collection and payment of cheques, other money transmission services, facilities for cash distribution (mainly by ATM machines either at manned branches or elsewhere) and the provision of statements in printed or electronic form': *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6 at [40] per Lord Walker. See also *Matei and another v SC Volksbank România SA* (C-143/13); [2015] 1 W.L.R. 2385.

²²⁶ H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-368.

²²⁷ See, for example, *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) [2009] E.C.R. I-4713.

²²⁸ This was particularly the case in *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

²²⁹ See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 7.90: 'We think that it would be helpful to have an express statement in legislation spelling out the effect of the CJEU case law. Although this is already the law, we think that it would be helpful to state it explicitly in order to bring this obligation to the attention of the courts. It should be particularly helpful in raising the awareness of the lower courts that this is in fact an obligation rather than just a power given to the courts'.

²³⁰ This 'does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term' (s.71(3)). For an argument that the duty under the Act is formulated in narrower terms than under the ECJ/CJEU see H.G. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-361.

²³¹ Cf. J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In addition to clarifying some of the issues mentioned above, some of which stem from a lack of clarity in the aims of the UCTD itself,²³² two factors need highlighting. First, it can be argued²³³ that the regulation of unfair terms requires a multi-dimensional approach including, for example, a consideration of the role standard industry terms can, and could play, in this context.²³⁴ Moreover Which? have argued:

'This assessment of the 'good faith' caveat has essentially stripped the unfair terms protections of any meaningful application in the UK. This is not what was intended when the UCTD was drafted. In our view, either:

- terms that create a significant imbalance in the parties' rights and obligations to the detriment of the consumer should be unfair and unenforceable, whether or not the trader imposed those terms 'in good faith'; or
- the meaning of 'good faith' must be made clear on the face of the Directive so that it cannot be used as a loophole to undermine the purpose and effect of the UCTD in practice.'

Secondly, if the regulation does impact on consumer confidence,²³⁵ further thought, perhaps, needs to be given to strategies to disseminate consumer rights/protections in this regard.²³⁶ The UK European Consumer Centre also noted: '[There are]... [s]ufficient legal provisions in place within a number of laws. In some cases, more swift and robust enforcement action may be the way forward, whenever traders choose to ignore the requirements or misinterpret the law.'

1.2.2. Effectiveness of the current rules in eliminating obstacles to the Internal Market

What is the effectiveness of the UCTD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the general fairness clause in different Member States shows disparities in the understanding of this principle and, if so, whether disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

By way of background, two points should be highlighted. First, under the CRA 2015 the test of unfairness is set-out, in reasonably familiar terms,²³⁷ in s.62(4):

'(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'

²³² See generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

²³³ J. Devenney & M. Kenny, 'The Regulation of Unfair Terms in Non-Professional Suretyship Agreements: Lessons for the Wider EU Harmonisation Agenda' in K. Fairweather, P. O'Shea and R. Grantam (eds.), *Credit, Consumer and the Law: After the Global Storm* (in press, Ashgate 2016).

²³⁴ C. Scott & J. Black, *Cranston's Consumers and the Law* (3rd edn., Butterworths, 2000) at pp.101-102.

²³⁵ Cf. 1.2.1.

²³⁶ Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2nd Edn., Hart Publishing, 2007) at p.510.

²³⁷ Regulation 5(1) previously provided: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Under the UTCCR 1999 there was evidence of some differences in approach by the courts in respect of the interrelationship between the constituent elements of the unfairness test,²³⁸ and indeed there was a question mark as to whether or not some of the approaches adopted were consistent with the case law of the (now) CJEU.²³⁹ Accordingly it is disappointing that the opportunity was not taken to further unpack the unfairness test. It is, of course, true that the CMA has provided guidance on the interplay between the constituent elements to the unfairness test but some guidance is rather general.²⁴⁰

Secondly, even if the unfairness test is being interpreted consistently throughout the EU, the application may be different as a result of local considerations. To some extent, this was recognised in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*²⁴¹ where the (now) CJEU noted that it 'may interpret general criteria used by the Community legislation in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term'.²⁴² More specifically this issue can be illustrated by the interaction of the unfairness test under the Unfair Terms Directive and background rules such as personal property law:

'the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.'²⁴³

Thus in *UK Housing Alliance (North West) Ltd v Francis*²⁴⁴ the (non-harmonised) protection that could be offered by courts in England and Wales in possession proceedings contributed to a finding that a term in a sale and leaseback arrangement was not unfair under the Unfair Terms in Consumer Contracts Regulations 1999. Indeed *Which?* has noted: 'Any move toward maximum harmonisation in this area must take into account the important additional protections that have been identified throughout the EU as essential for the adequate protection of consumers.'

- Whether any of the extended indicative lists, "black" and/or "grey" lists of unfair contract terms adopted in certain Member States represent a barrier to cross-border trade;

By way of background, it should be noted that the impact of non-harmonised law on cross-border trade is keenly contested.²⁴⁵

²³⁸ See, for example, the differing nuances of Lord Bingham and Lord Steyn in *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52. Lord Bingham (at [17]) appeared to view 'good faith' as concerned with procedural fairness whereas Lord Steyn (at [36]-[37]) appeared to view good faith as concerned with procedural and substantive fairness. Cf. *West v Ian Finlay & Associates* [2014] EWCA Civ 316.

²³⁹ 'With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive ... the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations': *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11) [2013] 3 C.M.L.R. 5.

²⁴⁰ 'The fairness test thus includes the following main elements: significant imbalance to the detriment of the consumer and good faith. It must, however, be emphasised that the overall requirement is a unitary one – the question is whether a term is unfair... A rigid approach to assessing fairness, involving an artificial exercise broken into separate parts, is not appropriate': CMA, *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (July 2015) para. 2.10.

²⁴¹ [2004] ECR-I 3403.

²⁴² At [22].

²⁴³ *Report on Directive 93/13/EEC on unfair terms in Consumer Contracts*, [Com (2000) 248 final] at p.30.

²⁴⁴ [2010] EWCA Civ 117.

²⁴⁵ See, for example, R. Halson and D. Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), *The Transformation of Private Law*, (Cambridge University Press 2013).

- Whether the other extensions of the application of this Directive (i.e. to individually negotiated terms and to terms dealing with the adequacy of price and main subject matter) in certain Member States represent a barrier to cross-border trade.

Again by way of background, it should be noted that the impact of non-harmonised law on cross-border trade is keenly contested.

1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

A case can be made for strengthening the position of SMEs in relation to unfair contract terms. Thus the Federation of Small Businesses reported:

- 'Half (52%) of small firms have been stung by unfair contract terms with suppliers, costing nearly £4 billion in the last three years.
- Suppliers are failing to make auto-rollover clauses clear up front (24%), tying businesses into lengthy notice periods (22%), charging high early termination fees (20%) and concealing details in small print (20%).
- Two in five (40%) respondents said they felt powerless to do anything about unfair contract terms because the supplier was too important or powerful to challenge.
- 42 per cent said that the contract terms that most negatively affected their business came from a contract with a supplier of energy, communications or financial services.'

However, the Federation of Small Businesses does not necessarily endorse strengthening the position of SMEs in relation to unfair terms in this context: 'FSB considers this to be a complicated area. Considerable nuance is needed re any policy action. FSB don't think the policy response should be crudely extending consumer protections to small businesses for example. FSB previously expressed a high degree of scepticism about extending aspects of consumer rights to small businesses and B2B transactions when this possibility was raised recently by the Commission in relation to digital consumer rights and the purchase of goods online. There are potentially big downsides to blunt measures, which will damage the flexibility and other benefits that small businesses enjoy under current English and Welsh contract law and we have argued in previous consultation responses that any measures along these lines are for Member States to decide.'

In 2005²⁴⁶ the Law Commission recommended, in broad terms, to extend the scope of the (then) UTCCR 1999 to small businesses:

'...subject to one proviso, there is wide support for protecting small businesses, particularly those that can be considered quasi-consumers because of their vulnerability in the market. The support came from many sectors of industry, law firms, the Financial Markets Law Committee and others. The proviso was that the regime should not apply to small businesses operating in the financial

²⁴⁶ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)).

sector, since these are often highly sophisticated, or to businesses closely associated with larger firms or companies.²⁴⁷

It is more difficult to make the case, in the UK, in relation to business contracts generally.²⁴⁸ One difficulty is, of course, how to appropriately and workably define a small business.²⁴⁹ The provisions providing protection against 'unfair' terms in the CRA 2015 do not²⁵⁰ apply to any businesses and, in contrast with the previous position under UCTA 1977,²⁵¹ a company is not capable of being a consumer under the CRA 2015.²⁵²

- Whether the system of protection established by the Directive, based on the concept of good faith and the significant imbalance in the parties' rights and obligations, would be appropriate for B2B transactions;

Although it is possible to argue that a different system of protection might be appropriate for B2B transactions,²⁵³ it may be more straightforward, particularly if the protection is only extended to small businesses, to use the same system of protection with the rider that the fact that the B2B, or more accurately business to small business (B2SB), context of the transaction is to be taken into account.²⁵⁴ The 2005 recommendations of the Law Commission also supported the extension of public enforcement to this context²⁵⁵ although it noted difficulties with funding for such an extension.²⁵⁶

²⁴⁷ *Ibid* at 2.32. The support was not, however, universal: 'The CBI maintained that giving additional protection to small businesses would make it riskier to contract with them and consequently would work against their interests. This is an important point. However, it was the firm view of the representatives of small businesses who responded – and in particular the Federation of Small Businesses – that greater protection is very much needed. It appears that small businesses may prefer a reduction in the risks they face even at the possible cost of some loss of business' (*ibid* at 2.33). Cf. BIS, 'Protection of Small Businesses when Purchasing Goods and Services: Call for Evidence', (BIS/15/209 (2005)).

²⁴⁸ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 2.24ff. Cf. also Law Commission, 'An Optional Common European Sales Law: Advantages and Problems Advice to the UK Government' (November 2012).

²⁴⁹ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.33ff.

²⁵⁰ Although cf. Arbitration Act 1996, s.90.

²⁵¹ See *R & B Customs Brokers v. United Dominions Trust* [1988] 1 WLR 321.

²⁵² See s.2(3): 'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.

²⁵³ Cf., for example, C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, Munich, 2009) and the discussion in P. Hellwege & L. Miller, 'Control of Standard Contract Terms', in G. Dannemann & S. Vogenauer, *The Common Frame of Reference for European Contract Law and its Interaction with English and German Law* (Oxford University Press, 2013).

²⁵⁴ Note Article 4(1) of the UCTD: '1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.

²⁵⁵ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.94.

²⁵⁶ 'We accept these submissions and we would like to recommend this extension. However, our enquiries into the practical implementation of such a scheme have led to doubts over whether there are suitable enforcement bodies capable of meeting the cost and willing to do so. In particular, the Office of Fair Trading has indicated that it would not be willing to take on the role of policing small business contracts. In short, there appear to be no bodies which currently have the resources effectively to carry out this role. We have not, therefore, made provision in the Draft Bill for a preventive powers regime in respect of terms in small business contracts': Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.95.

- The appropriate scope of B2B protection against unfair contract terms – should the protection, if at all needed, extend to individually negotiated terms, the main subject-matter of the contract and the adequacy of the price;

The 2005 recommendation of the Law Commission to, in broad terms, extend the (then) UTCCR 1999 protection to small businesses also included a recommendation not to extend the protection afforded to small businesses in respect of unfair terms to negotiated terms,²⁵⁷ not least as it seemed there was little appetite for such an extension.²⁵⁸ On the other hand, it can be argued, given some of the vulnerabilities potentially faced by small businesses and by analogy with the position with consumers following the CRA 2015, that such an extension, at least from a consumer protection perspective, is desirable.²⁵⁹

- Whether there are specific contractual terms often used in B2B transactions which could be regarded as unfair in all circumstances or presumed to be unfair;

From a UK perspective there are some terms which, even between large businesses, would be regarded as 'unfair'.²⁶⁰ A more difficult question is whether terms which exclude liability for breach of statutory implied terms (e.g. ss13-15 of the Sale of Goods Act 1979) should be prohibited by analogy to the provisions preventing exclusion of analogous terms in consumer contracts under the CRA 2015.²⁶¹ On balance, in the light of the many different types of small businesses, it can be argued that such terms should not be 'unfair' *per se* but should be subject to an unfairness test.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

From a UK perspective, this may not be too controversial given, for example, approaches to interpretation,²⁶² the *Interfoto* line of authority²⁶³ etc. However, much would depend, for example, on the standard to be applied in assessing those concepts and the consequences of non-compliance.²⁶⁴

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

As noted above,²⁶⁵ the impact of harmonised law on cross-border trade is keenly contested. Much will, of course, depend on the merits of the relevant rules selected.²⁶⁶ However, as hinted at above, there seems to be more of a case in relation to small businesses given that such business may not have access to appropriate legal advice etc.²⁶⁷

²⁵⁷ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.68.

²⁵⁸ See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 1.13.

²⁵⁹ A slightly different question is whether public enforcement, given the potential cost, should be extended to non-negotiated terms in this context.

²⁶⁰ See, for example, UCTA 1977, s.2(1): "A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence."

²⁶¹ See above at 1.2.1.

²⁶² Cf., for example, *Houghton v. Trafalgar Insurance Co* [1954] 1 QB 247.

²⁶³ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

²⁶⁴ See above at 1.2.1.

²⁶⁵ See 1.1.4.

²⁶⁶ Cf. J. Devenney, M. Kenny & L. Gillies, 'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', (2012) *Yearbook of Private International Law* 315 at 329.

²⁶⁷ See Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 5.15.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

As noted above, there seems to be a case that small businesses are prevented from making full use of the internal market by the absence of such rules, given that such businesses may not have access to appropriate legal advice etc.²⁶⁸

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As noted above,²⁶⁹ the impact of harmonised law on cross-border trade is keenly contested.

1.3. Injunctions

1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

What is the effectiveness of the ID (i.e. the national laws transposing it) in terms of:

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?²⁷⁰

The ID has been transposed in the UK, in fairly complex terms, by Part 8 of the Enterprise Act 2002. Part 8 distinguishes between 'domestic infringements'²⁷¹ and 'community infringements'.²⁷² It also distinguishes between general enforcers,²⁷³

²⁶⁸ See Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 5.15.

²⁶⁹ See 1.1.4.

²⁷⁰ Consumers' detriment should be understood as consumers' financial loss caused or that could have been caused by the infringements as defined by article 1(2) of the Injunctions Directive.

²⁷¹ See s.211: '(1) In this Part a domestic infringement is an act or omission which—(a) is done or made by a person in the course of a business, (b) falls within subsection (2), and (c) harms the collective interests of consumers. (1A) But an act or omission which satisfies the conditions in subsection (1) is a domestic infringement only if at least one of the following is satisfied— (a) the person supplying (or seeking to supply) goods or services has a place of business in the United Kingdom, or (b) the goods or services are supplied (or sought to be supplied) to or for a person in the United Kingdom (see section 232). (2) An act or omission falls within this subsection if it is of a description specified by the Secretary of State by order and consists of any of the following— (a) a contravention of an enactment which imposes a duty, prohibition or restriction enforceable by criminal proceedings; (b) an act done or omission made in breach of contract; (c) an act done or omission made in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings; (d) an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings; (e) an act done or omission made by a person supplying or seeking to supply goods or services as a result of which an agreement or security relating to the supply is void or unenforceable to any extent; (f) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to exercise a right or remedy relating to the supply in circumstances where the exercise of the right or remedy is restricted or excluded under or by virtue of an enactment; (g) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid (to any extent) liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment.'

²⁷² See s.212: '(1) In this Part a Community infringement is an act or omission which harms the collective interests of consumers and which—(a) contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State, (b) contravenes such laws, regulations or administrative provisions which provide additional permitted protections, 2(c) contravenes a listed Regulation, or (d) contravenes any laws, regulations or administrative provisions of an EEA State which give effect to a listed Regulation. (2) The laws, regulations or administrative provisions of an EEA State which give effect to a listed Directive provide additional permitted protections if—(a) they provide protection for consumers which is in addition to the minimum protection required by the Directive concerned, and (b) such additional protection is permitted by that Directive'.

²⁷³ S.213(1).

designated enforcers,²⁷⁴ community enforcers²⁷⁵ and CPC enforcers.²⁷⁶ Enforcement procedures are set out in ss.214-223, with s.217 making provision in respect of enforcement orders.²⁷⁷ S.221 provides:

‘(1) Subsection (2) applies to—

- (a) every general enforcer;
- (b) every designated enforcer which is a public body.

(2) An enforcer to which this subsection applies has power to take proceedings in EEA States other than the United Kingdom for the cessation or prohibition of a Community infringement.

(3) Subsection (4) applies to—

- (a) every general enforcer;
- (b) every designated enforcer;
- (c) every CPC enforcer.

(4) An enforcer to which this subsection applies may co-operate with a Community enforcer—

- (a) for the purpose of bringing proceedings mentioned in subsection (2);
- (b) in connection with the exercise by the Community enforcer of its functions under this Part.’

The CMA regard these powers as an important part of its consumer protection armoury.²⁷⁸ However Which? has identified cost risk as limiting the effectiveness of this procedure:

‘The principal reason why the power to take injunctive action has been so little used in the UK is because enforcers face substantial cost risk. Court action in the UK is very expensive. Not only does the enforcer have to bear its own costs of bringing proceedings, if the enforcer loses the action then it also has to pay the trader’s legal costs, which could be very significant. This problem is often exacerbated by an inequality of arms as between a consumer organisation or public enforcer on the one hand, and a large corporation with a substantial

²⁷⁴ S.213(2).

²⁷⁵ S.213(5): ‘A Community enforcer is a qualified entity for the purposes of the Injunctions Directive—(a) which is for the time being specified in the list published in the Official Journal of the European Union in pursuance of Article 4.3 of that Directive, but (b) which is not a general enforcer, a designated enforcer or a CPC enforcer.’ CPC enforcers may make applications for enforcement orders: see s.215(4A).

²⁷⁶ S.213(5A). This relates to Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer laws (OJ No L364/1, 9.12.2004) as amended.

²⁷⁷ ‘(3) If this section applies the court may make an enforcement order against the person. (4) In considering whether to make an enforcement order the court must have regard to whether the person named in the application— (a) has given an undertaking under section 219 in respect of conduct such as is mentioned in subsection (3) of that section; (b) has failed to comply with the undertaking. (5) An enforcement order must— (a) indicate the nature of the conduct to which the finding under subsection (1) or (2) relates, and (b) direct the person to comply with subsection (6).’

²⁷⁸ See OFT, *Enforcement of consumer protection legislation*, (OFT512 (2008)) which has now been adopted by the CMA. See also ‘Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries: A report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich’ (2008) at p.21: ‘Overall, we conclude that the UK is on a par with the best in respect of the legislative framework (with the caveat that the volume and complexity of the legislation could be simplified). The UK is on a par with the best in terms of its provision of consumer information and advice, and consumer advocacy. In respect of redress mechanisms, the UK’s position on ADR could be further improved and likewise the small claims procedure (which currently takes a year on average) could be enhanced. The UK’s system is underpinned by a strong public enforcement regime. In the light of forthcoming legislative changes, the key enforcement agencies will have a number of different types of enforcement powers which will enable them to regulate business in a responsive way. There is also evidence that the UK does focus its enforcement resources to deal with systemic market problems, and has challenging targets against which performance is measured.’

litigation budget on the other [...] The Directive itself is silent on costs. For *Which?*, the cost of litigating, and our exposure to the risk of paying the trader's costs, has inevitably been a key consideration when contemplating action. The same is true for Trading Standards, who tell us that pursuing civil cases is often too costly for them, and that adverse costs risk – particularly in the context of falling local authority budgets – is a significant factor in deterring actions. Importantly, Trading Standards do not have rights of audience in the civil courts (as opposed to the criminal courts, where they do) which means they have the additional cost of hiring counsel.'

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the summary procedure, the publication of the decision and/or the publication of a corrective statement, the sanctions for non-compliance with the injunction order (Art. 2(1) of the Injunctions Directive), the prior consultation (Article 5 of the Injunctions Directive), and the effects of the injunction order?

S.214 makes provision in respect of prior consultation with the person against whom an enforcement order might be sought and s.219 makes provision in respect of undertakings from such person that they will not, for example, continue or repeat certain conduct.²⁷⁹ There is evidence, albeit in the context of the UCTD, of the effectiveness of this preliminary type of enforcement practice.²⁸⁰

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Above 'domestic infringements'²⁸¹ and the application of Part 8 to situations where the UK has gone beyond the minimum harmonisation requirements in particular directives have been discussed.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The Consumer Rights Act 2015 added new ss.219A-219C into the Enterprise Act 2002.²⁸² This provides for 'enhanced consumer measures':

'The aim of Schedule 7 is to provide greater flexibility for public enforcers and the civil courts in relation to the contents of enforcement orders and undertakings made under Part 8 of the EA. If they are deemed suitable for a particular case, public enforcers and the civil courts will be able to attach (where they consider it just and reasonable) enhanced consumer measures to enforcement orders and undertakings. The enhanced consumer measures will need to fall into at least one of three specified categories (referred to as the redress, compliance and choice categories). Measures in the redress category will offer compensation or other redress to consumers who have suffered loss as a result of the breach of consumer law. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches. Measures in the choice category will help consumers obtain

²⁷⁹ S.219(4).

²⁸⁰ See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

²⁸¹ Note also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 1.64: 'The areas covered are mainly those civil and criminal measures which do not fall or only partially fall under the definition of a Community infringement under s212.'"

²⁸² See s.79 and Schedule 7 of the Consumer Rights Act 2015.

relevant market information to enable them to make better purchasing decisions.^{283,284}

In terms of the cost risk identified above, Which? has proposed:

'We suggest that the Directive incorporates a principle that enforcers should not be required to pay the trader's costs where an action is unsuccessful - in recognition of the public interest function of the proceedings - so long as the enforcer does not act unreasonably...Any argument that this would lead to more unmeritorious or spurious enforcement cases is unfounded. There are (and there will inevitably remain) significant pressures on enforcers - such as budgetary constraints and reputational considerations - which incentivise them to prioritise those cases that will have the greatest public benefit for the resources deployed. However, if Member States felt that a financial incentive was also needed, then in unsuccessful cases an enforcer could be required to pay a fixed fee of (say) several thousand Euro toward the trader's costs. This model has proved successful in other Member States, such as Belgium.'

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Subject to the comments above²⁸⁵ about the MCAD, there is a case for extending the protection in the ID to business interests, at least where there is a clear internal market need.

1.3.2. Effectiveness of the current rules in eliminating obstacles to the Internal Market

What is the effectiveness of the ID in eliminating obstacles to the Internal Market in terms of:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

The procedures outlined above²⁸⁶ seem to represent a fairly comprehensive package²⁸⁷ although it will, for example, depend on the level of effectiveness of cross-border co-

²⁸³ See *Consumer Rights Act 2015: Explanatory Notes* at [383]. For further guidance see BIS, *Enhanced Consumer Measures: Guidance for Enforcers of Consumer Law*, (BIS/15/292 (2015)).

²⁸⁴ Which? noted: 'ECMs represent a welcome addition to the domestic enforcement toolkit in the UK. We would encourage the Commission to consider introducing similar measures at an EU level.' Which? also noted: 'In the UK, enforcers do not currently have the power to impose fines or monetary penalties for breaches of consumer protection law. This is in stark contrast to the position around breaches of competition law, for which the European Commission (and domestically the CMA) can impose significant fines. It is also inconsistent with the position in relation to (i) consumer law enforcement in other jurisdictions, both in other Member States and outside the EU; and (ii) the powers of other sector regulators in the UK, such as the Financial Conduct Authority and the Claims Management Regulator, which have fining powers... We believe that the introduction of fining powers would strengthen compliance incentives for business and operate as a significant deterrent against breaches. It would also ensure a greater degree of consistency across the enforcement landscape...The level of any fines should be calculated to ensure a real deterrent effect, as opposed to token amounts which are likely to be considered simply as 'the cost of doing business'. Fines should therefore be set in a proportionate and meaningful way whilst ensuring flexibility. Linking fines to turnover may be appropriate, as the Commission does in relation to competition law fines.'

²⁸⁵ See 1.1.3.

²⁸⁶ See 1.3.1.

²⁸⁷ See, in particular, s.215(4).

operation.²⁸⁸ The Department for Business, Energy and Industrial Strategy commented as part of the interview process that:

'Injunctions are an effective part of the enforcement toolkit, but need to be accompanied by other tools such as cross border enforcement. Some clarification of the interplay and coherence between the Injunctions Directive and other provisions on the enforcement of consumer rights would help strengthen the consumer protection regime.'²⁸⁹

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

This framework has already been outlined above,²⁹⁰ and no particular issues were identified by the CMA in its publication Enforcement of consumer protection legislation.²⁹¹

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

It can be argued²⁹² that non-legislative harmonisation is a key ingredient in the effectiveness of EU consumer legislation, particularly in terms of regulators and enforcers from different EU Member States developing a shared understanding of, for example, unfairness under the UCTD.

1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

There is some scope for the streamlining of the relevant provisions in the UK. For example, under the Consumer Rights Act 2015, the CMA (and other Regulators) are able to enforce Part 2 of the Act.²⁹³ Schedule 3 provides a framework for this type of enforcement action and applies to:

- '(a) a term of a consumer contract,
- (b) a term proposed for use in a consumer contract,
- (c) a term which a third party recommends for use in a consumer contract, or

²⁸⁸ Cf. 'Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' [2015] EU Focus 1.

²⁸⁹ Interview feedback, 11 August 2016.

²⁹⁰ See 1.3.1.

²⁹¹ (CMA7, (2014)).

²⁹² J. Devenney and M. Kenny, 'Unfair Terms and the Draft Common Frame of Reference: The Role of Non-Legislative Harmonisation and Administrative Co-Operation?' in J. Devenney and M. Kenny, *European Consumer Protection: Theory and Practice* (Cambridge University Press, 2012).

²⁹³ See s.70. In relation to investigatory powers see Schedule 5 which enhances the powers under the UTCCR 1999.

(d) a consumer notice.²⁹⁴

The CMA, or other Regulator, is able to bring an application for an injunction (or interdict in Scotland) in relation to 'the use, proposing or recommending'²⁹⁵ of a relevant term or notice.²⁹⁶ Significantly, however, this power extends to terms or notices which are prohibited without the need to assess fairness (which relate, in particular, to sections of the Act which broadly replicate some of the more protective consumer provisions formerly found in UCTA 1977):

'A term or notice falls within this sub-paragraph if it purports to exclude or restrict liability of the kind mentioned in—

- (a) section 31 (exclusion of liability: goods contracts),
- (b) section 47 (exclusion of liability: digital content contracts),
- (c) section 57 (exclusion of liability: services contracts), or
- (d) section 65(1) (business liability for death or personal injury resulting from negligence).²⁹⁷

This power also now extends to individually negotiated terms²⁹⁸ and to consumer notices,²⁹⁹ neither of which was, at least clearly in relation to the latter, required by the UCTD.

The public enforcement provisions in the Act are, in fact, part of the tapestry of public enforcement provisions relevant to the regulation of unfair terms. In addition to the provisions under the Act, it is possible to take public enforcement action under Part 8 of the Enterprise Act 2002 (which relates, in particular, to infringements of Community legislation) and under the Consumer Protection from Unfair Trading Regulations 2008.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

This has been covered under the last item.

1.4. Cross-cutting issues

1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

It can be argued that consumers benefit, in general, from the regime established by the minimum and fully harmonised EU consumer rules aimed at unfair commercial practices and unfair standard terms in contracts; and that, moreover, consumers

²⁹⁴ Schedule 3, para 1.

²⁹⁵ Schedule 3, para 3.

²⁹⁶ This power is significant in terms of the CMA or other Regulator obtaining 'undertakings' instead of seeking an injunction etc. - see Schedule 3, para 6.

²⁹⁷ Schedule 3, para 3(2).

²⁹⁸ See 1.2.1.

²⁹⁹ Cf. H. Beale (ed.), Chitty on Contracts, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-392.

benefit from the interplay of different public, private and criminal law regimes. In addition, the case can be made that the effective enforcement of consumer protection is enhanced through a diverse regime of collective redress^{300,301} and methods of alternative and online dispute resolution (ADR and ODR).³⁰² Many argue that this diverse regime is required given the potential for consumer disputes, the relative low value of individual cases and the imbalance of bargaining power. The OECD has recommended that all states should adopt mechanisms enabling consumers to be able to resolve disputes whether individually, collectively or through public authorities, stressing a need for a combination of mechanisms, and for direct negotiation as the first option.³⁰³

That this diversity is required *inter alia* because many consumer losses are so small as to be not worth pursuing through private litigation clearly raises the issue of the relative efficiency of consumer protection under the consumer protection rules. One consistent concern which is expressed relates to the costs for consumers of exercising their rights under the directives. The UK European Consumer Centre noted: 'In the UK, most of consumer disputes are within the upper limit of small claims value wise. This can sometimes be more problematic with cross border disputes, where there is the need to take legal action in another country. This is due to the requirement to be represented by a lawyer, which can be cost prohibitive for consumers sometimes.' Beyond the issue of litigation costs, some have argued (as noted above) that it is not clear that the main focus, for example, of the UCTD is on establishing a high level of protection; nor that the nexus between a high level of consumer protection and increased participation in the internal market is proven.³⁰⁴ Moreover, given the contested prevalence of information requirements in the relevant directives, the precise extent of consumer protection will vary on the context of the transaction; there are, additionally, now a plethora of cross-cutting national and EU information duties which further complicate the consumer's position.

Litigation therefore needs to be placed in a matrix of collective redress, ADR and ODR. ADR, furthermore, is encouraged in sector specific secondary legislation (seen in Telecoms, Energy, Consumer Credit, Payment Services and Universal Services

³⁰⁰ Encouraged by the European Parliament (EP). See EP Report 'Towards a Coherent European Approach to Collective Redress' (A7-0012-2012, 12 January 2012): para 25: '...the availability of an effective judicial redress system would act as a strong incentive for parties to agree an out-of-court settlement, which is likely to avoid a considerable amount of litigation; encourages the setting-up of ADR schemes at European level so as to allow fast and cheap settlement of disputes as a more attractive option than court proceedings, and suggests that judges performing the preliminary admissibility check for a collective action should also have the power to order the parties involved to first seek a collective consensual resolution of the claim before launching collective court proceedings; believes that the criteria developed by the Court should be the starting point for the establishment of this power; stresses, however, that these mechanisms should remain, as the name indicates, merely an alternative to judicial redress, not a precondition therefore...'

³⁰¹ Which? noted: 'Currently, individualised private enforcement of consumer rights through the courts is largely untenable. Despite the European Commission's Recommendation on collective redress being published in 2013, the UK is yet to introduce a viable collective mechanism by which UK consumers can enforce their consumer rights. We understand that the position is similar in many other Member States. In addition, while the ADR Directive has led to the availability of ADR in all sectors, the use of ADR by traders is not mandatory and take-up outside of the regulated sectors has been minimal [...] In our view, EU legislation is now required to set a minimum standard for the availability of collective redress mechanism for breaches of consumer law, based on an opt-out model. This issue should be addressed as part of the REFIT programme, given the pivotal role of private enforcement in the wider compliance landscape.'

³⁰² See, for example, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22 (OJ L165, 18.6.2013, p.63), Regulation 524/2013/EU of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L165, 18.6.2013, p.1) pursuant to: 2011 Commission Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes, COM(2011) 793/2. Commission Proposal for a Regulation on Online Dispute Resolution (ODR) for Consumer Disputes, COM(2011) 794/2.

³⁰³ OECD, *Recommendation on Consumer Dispute Resolution and Redress* (Paris: OECD, 2007) at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

³⁰⁴ See above.

Directives)³⁰⁵ and in the elaborations of end-user and EU citizenship rights (see below). Notwithstanding criticism of ADR,³⁰⁶ it is still too early to assess the success of EU initiatives aimed at introducing/improving methods of collective redress and ADR and ODR. Similarly, it is too early to judge the impact of the introduction of new remedies.³⁰⁷

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Traders, too, can benefit, in general, from the consumer rights' floor and the level playing field provided through the EU regime of consumer protection. However countervailing concerns can be expressed as regards the regulatory burden placed, in particular, on small traders (see below). More subtly, traders may be lulled into a false sense of security by 'misapplications' of EU directives (see *Abbey National* and 2012 OFT Issues Paper).

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Traders may express a concern that the rules lead to excessive regulatory burden, especially on small traders. However, as noted above, in the UK national flanking measures have been taken which aim to address the regulatory burden.³⁰⁸ Similarly, some traders may argue that traders are adversely affected by rules directed, in particular, at the protection of vulnerable consumers.

Meanwhile, the case could be made, seen above, that the minimum harmonisation derogation under the UCPD has a negative impact and dampening effect on cross-border trade; this means that minimum harmonisation derogations do not necessarily improve or promote the internal market and reduce the benefits traders had expected.³⁰⁹ Furthermore, the application of the UCPD through the 'blacklist' of unfair commercial practices attracting criminal sanctions may create additional burdens on business, and especially small businesses, as previously analysed. Although, as observed above, a virtual blacklist appeared to have been already operating in this area.

Similarly, on the implementation of the MCAD there may be concerns, despite the general view that the principle-based approach was appropriate, with the use of

³⁰⁵ Seen, *inter alia*, in E-commerce, Postal Services and MiFID Directives.

³⁰⁶ P. H. Lindblom, 'ADR - The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden' (2008) 1 ERPL 63-93 at 89. 'In the worst case, ADR may function as an opiate to the legal system. The legislature and the courts are made passive. Citizens are lulled into a false sense of readily available and qualitative access to justice in society. The judiciary functions of behaviour modification, judicial lawmaking, judicial and administrative review - as well as the court's communicative functions - are weakened and impeded. The pros of ADR are few compared to the cons.' Similarly, J. Davies & E. Szyszczak 'ADR: effective protection of consumer rights?' (2010) E.L.Rev. 695 at 707: 'Allowing and encouraging a significant number of consumer-supplier disputes to be settled by ADR processes as a general principle denies the role of law to move beyond the contractual content of USO settlement of the individual dispute to the creation of stronger qualitative concepts of USOs which are at the heart of new consumer citizenship objectives in the EU.'

³⁰⁷ BIS, Misleading and aggressive practices – Guidance on new rights for consumers: BIS Guidance on the Consumer Protection (Amendment) Regulations, 2014.

³⁰⁸ For example: BIS Press Release 16 October 2014: <https://www.gov.uk/government/news/street-trading-and-pedlary-laws-to-be-modernised>. The UK European Consumer Centre noted: 'These rules are fairly clear and concise and in most cases it is possible to seek business advice from Trading Standards departments at no cost.'

³⁰⁹ See above at 1.1.4.

criminal sanctions for misleading advertising; especially where, particularly in the absence of fraud, such sanctions have a dampening effect on cross-border trade.

- What are the costs involved in the public enforcement of these rules?

On paper Regulators have an impressive array of powers. For example, in the area of financial services, the Financial Conduct Authority (FCA) may take a wide variety of measures.³¹⁰ Impressive though these powers are, there have been concerns that the regulatory authorities do not have the resources to expedite their tasks.³¹¹ To an extent the *inefficiency* of public enforcement may therefore be attributed to underfunding and this position has worsened in the wake of the financial crisis. According to Garside levels of funding for consumer protection are no longer relevant to optimal levels of protection: amounting to £1.99 [approx. EUR 2.30] per citizen per year.³¹² Moreover, the case for a mix of enforcement tools only works if public enforcement is adequately funded. Given the poor funding of the regulatory authorities, implementation of consumer protection may not be as effective as it could be.

Yet there are important counter arguments relating to the place of public enforcement and one-dimensional models of public enforcement. First, what appears to be influential, beyond the level of funding, for public enforcement is its interplay with other forms of self- and co-regulation.³¹³ Similarly, the reliance on one-dimensional models of public enforcement, such as the criminal and administrative sanctions originally introduced under the CPUTR, have proven to be inefficient.³¹⁴

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Again in the area of unfair contract terms there is concern in the UK, highlighted in the non-referral to the CJEU of the interpretation of Reg. 6(2) of the UTCCR, in *OFT v Abbey National* (see discussion above).³¹⁵ *Abbey National* presents the issue of improperly implemented and applied directives. This was addressed by the 2012 Law Commissions' Issues Paper on Unfair Terms in Consumer Contracts,³¹⁶ which concluded that the case lulls traders into a false sense of security.³¹⁷ The question of the fairness review was subsequently 'resolved' on the basis of transparency of the relevant terms and changes brought about in the Consumer Rights Act 2015. It has, however, been disputed whether this reliance on the transparency of information works to improve consumer protection, especially in the area of financial services.³¹⁸ Moreover, if a question arises on the correct interpretation of a transposed directive, there is the further issue of ensuring the referral to the CJEU; referral is not the claimant's right but is in the gift of the national court.³¹⁹

Finally, finding the right balance between public and private enforcement is important in ensuring efficient implementation of consumer protection directives. As seen above, the original enforcement model for the CPUTR foresaw reliance on a regime of criminal/administrative sanctions; a model which simply did not work effectively. This,

³¹⁰ <https://www.the-fca.org.uk/about/enforcement> .

³¹¹ See generally above in 1.1.1.

³¹² See generally above in 1.1.1.

³¹³ See above at 1.1.1.

³¹⁴ See above at 1.1.1.

³¹⁵ *OFT v Abbey National* (2009) UKSC 6.

³¹⁶ Law Commission, 'Issues Paper, Unfair Terms in Consumer Contracts: a new approach?' 25 July 2012.

³¹⁷ *Ibid* para 8.1.2.

³¹⁸ Adequacy of the information paradigm in consumer protection. See generally: A. Colombi-Ciacchi & S. Weatherill *Regulating Unfair Banking Practices in Europe* (OUP, 2010).

³¹⁹ Famously the CILFIT doctrine (Case 283/81 *CILFIT* [1982] ECR 3415, paras.14 & 16) addresses the limited cases in which the national court need not refer questions of interpretation to the CJEU.

in turn, established the case for the introduction of private redress rights under the CPUTR 2008.³²⁰

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The majority view seems to be that funding for implementation and enforcement is already at dangerously low levels. Any further reduction in expenditure is likely to be counter-productive; even modest increases in funding would help optimise the level of consumer protection. However, one suggestion which might partially counter this view is the proposition that broadening the circle of super-complainants might raise the overall efficiency of consumer protection.

1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

Consumer Financial Services: As discussed above there has been a significant issue on the applicability of the fairness review under the UCTD in the area of consumer financial services in the wake of *Abbey National*. This debate on the correct application of the UTCCR, is ongoing even after the introduction of the Consumer Rights Act 2015. It can therefore be argued that awareness of the horizontal requirements of the UCTD is distinct from the correct interpretation and application of the relevant horizontal provision.

Passenger Transport: the horizontal EU regime is overshadowed by national legislation on exclusion clauses.³²¹ For example, the Road Traffic Act 1988 and the Public Passenger Vehicles Act 1981 provide, respectively, that any antecedent agreement or understanding between the user of a motor vehicle and his passenger(s) which purports to restrict the driver's liability to that passenger in respect of risks for which compulsory insurance cover is required³²² is void under s.149(2) of the Road Traffic Act 1988. Meanwhile the Public Passenger Vehicles Act 1981, section 29,³²³ invalidates a provision contained in a contract for the carriage of a passenger in a public service vehicle where that provision purports to restrict the liability of a person in respect of a claim which may be made against that person in respect of the death or personal injury to a passenger while being carried in, or who is entering or is alighting from the vehicle, or which purports to impose any conditions as to the enforcement of such liability.

Air transport: Meanwhile, in Air Transport national and EU sectoral measures intervene in the treatment of unfair terms and unfair commercial practices. In this context The Carriage by Air Acts (Implementation of the Montreal Convention 1999)

³²⁰ See above, 1.1.1.

³²¹ R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11th Ed., Sweet & Maxwell, 2014) at 6-004.

³²² See s.143 of the Road Traffic Act 1988.

³²³ Cf. Rights of Passengers in Bus and Coach Transport (Exemptions and Enforcement) Regulations 2013/1865.

Order 2002,³²⁴ under the heading 'Liability of the Carrier and Extent of Compensation for Damage', provides that any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void. An identical provision also applies in relation to combined carriage.³²⁵ The limit is currently approximately EUR 1134.71.³²⁶ A passenger can increase this by making an advance declaration and paying a supplementary fee.³²⁷

Electronic communications: Finally, in Electronic Communications, The Privacy and Electronic Communications (EC Directive) Regulations 2003 impose certain obligations in relation to electronic communications. Regulation 27 provides that any contract term between subscriber and the provider of a public electronic communications service or, between the provider of such a service and the product of an electronic communications network, inconsistent with any such right, shall be void.³²⁸

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law and the sector specific rules, or whether there are different authorities responsible for these two sets of rules; [*If different entities are responsible, key aspects are: Is there an institutionalised cooperation between them? Does the institutional arrangement for enforcement affect the use of UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

There are frequently overlaps between the enforcement powers of regulators which may be seen as inefficient and requires coordination.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, unfair commercial practices, and information obligations regarding advertising; [*Key aspects to consider are: How do they work together with the sectoral legislation? Are there issues/overlaps/conflicts etc.?*]

In theory, the variety of public, private, criminal, regulatory and co- and self-regulatory regimes form a sophisticated regime with a number of control mechanisms. In practice, the system of public enforcement appears underfunded, while private litigation is subject to limits to redress and a welter of cross-cutting sectoral regimes. Moreover, there appear to be important issues/overlaps and conflicts between the horizontal and the sector-specific rules, for example, on the treatment of vulnerable consumers (see below).

It can be argued that neither domestically (CRA 2015) nor at EU level (Consumer Rights Directive 2011) has legislation gone far enough to consolidate the complexity of the law in consumer protection; consumers seem either reluctant or less than willing to engage with the full suite of remedies.³²⁹

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

See above.

³²⁴ SI 2002/263. The Order amends the Carriage by Air Act 1961, and disapplies s.1 of that Act in relation to Community carriers to the extent that Council Regulation 2027/97 has the force of law in the UK. The Convention entered into force in the EU on June 28, 2004. The Convention itself came into force on November 3, 2003.

³²⁵ Combined carriage: Carriage partly by air and partly by some other mode.

³²⁶ R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11th Ed., Sweet & Maxwell, 2014).

³²⁷ R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11th Ed., Sweet & Maxwell, 2014).

³²⁸ R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11th Ed., Sweet & Maxwell, 2014).

³²⁹ Report p.21.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

The full complexity of provision (as seen above), in particular the interplay of EU sector specific rules, horizontal rules and non-consumer law provisions, is seen most tangibly in the treatment of vulnerable consumers (see below, 1.4.4.). Furthermore, the interplay of different models of self- and co- regulation may be seen as making this area ripe for clarification, especially in the light of what some regard as the failures of the CRA 2015 and 2011 Consumer Rights Directive to consolidate the law.

1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to consumer-to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader (e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

See above. In relation to C2B contracts, the UK European Consumer Centre noted: 'This is still most likely to be considered a B2C agreement, where the existing rules apply.'

1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Traditionally English law has not specified a consistent and unambiguous definition of a 'consumer'.³³⁰ A consumer transaction in English law generally involved three elements:

- the 'consumer' must be a person/organisation not acting in a business capacity';
- the seller or supplier must act in 'in the course of business' and;
- the goods/services must be intended for private and not business use.

The traditional English definition was thus quite narrow and did not admit a particular category of 'vulnerable' consumers.³³¹ To Reich the advent of the consumer-citizen, through a broad reading of Articles 20 and 169 TFEU, broadened the definition of the European consumer.³³² The notion of the vulnerable consumer has been with us,

³³⁰ The most common domestic definition of a consumer was that of an individual who purchases goods or acquires services from a commercial organisation. In some contexts, however, a commercial organisation acquiring goods or services from another may be deemed a 'consumer'. More widely, consumers can be equated with 'citizens', to the extent that the enforcement of rights are concerned, so that potential recipients of social security benefits could be seen as consumers as would the recipients of other services provided in the 'public' sphere. Cf. now the CRA 2015, s.2.

³³¹ *R & B Customs Brokers v United Dominions Trust* [1988] 1 WLR 321. *Ashington Piggeries v Christopher Hill Ltd* [1972] AC 441.

³³² N. Reich, H. Micklitz & P. Rott, *Understanding EU Consumer Law* (Intersentia, 2009) at 48: 'The term 'consumer' in Article 169 TFEU and 'citizen of the Union' in Article 20 TFEU are substantially concurrent: each describes a subject with a certain EU legal status, a definition which goes beyond the scope of the classical fundamental EU freedoms. With regard to the EU citizen the freedom of movement and the rights based on information and protection of legitimate interests constitute the central reference points for the granting of subjective rights which can be further developed by a network of secondary law.'

arguably, since the landmark case of *Buet*.³³³ The importance of a high level of consumer protection reaffirmed in *Mostaza Claro*.³³⁴ Waddington, meanwhile, observes that whereas EU consumer protection law has, in general, not sufficiently protected the vulnerable,³³⁵ vulnerable consumers are protected, to an extent, in a variety of sectoral measures, *inter alia*:

- Services of General Economic Interest.³³⁶
- Electricity Market Directive³³⁷ vulnerability in the context of 'household customer'.
- Gas Market Directive³³⁸ 'household customer'.
- Universal services.³³⁹
- Services Directive³⁴⁰ Article 4 (3) providing that the 'recipient' of services means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service.
- Payment Services Directive³⁴¹ Article 4 (10): the 'payment service user' means a natural or legal person making use of a payment service in the capacity of either payer or payee, or both'.
- Air Passenger Rights Regulation³⁴² 'passenger rights'.

However, though the Commission has mapped out some sectoral contours of vulnerability, for example, in the energy sector,³⁴³ Bartl observes that great differences emerge between the Member States on the concept of vulnerability and

³³³ Case 382/87 *Buet and Educational Business Services v Ministère Public* [1989] E.C.R. 1235; [1993] 3 C.M.L.R. 659. para. 13 '...there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who... are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects...' See: J. Stuyck, 'The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime'; *The Yearbook of Consumer Law* (2007), p.167.

³³⁴ Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para.38: 'The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.'

³³⁵ L. Waddington, 'Vulnerable and Confused: the protection of 'vulnerable' consumers in EU law' (2013) 38(6) *ELRev* 757 at 781: 'EU law both fails to adopt such an approach, and, to the extent that EU instruments provide for full harmonisation, also hampers any efforts of Member States to take such action. However, examples of such targeted measures from areas outside "classic" consumer protection law can be found in EU legal instruments. Measures relating to Services of General Economic Interest, such as the supply of energy, do provide additional protection for consumers who are regarded as "vulnerable" in specific ways, for example because of fuel poverty. In addition to universal service obligations, such instruments can also contain particular duties owed to specific groups of vulnerable consumers. Elsewhere, some EU instruments establish an obligation to provide information in non-standard and accessible formats and, more generally, to take measures to avoid indirect discrimination. However, in spite of the emphasis placed on providing consumers with information... no equivalent obligations can be found in EU consumer protection law.'

³³⁶ Directive on Services of General Economic Interest.

³³⁷ Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L211/55 (Electricity Market Directive).

³³⁸ Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 (Gas Market Directive) [2009] OJ L211/94.

³³⁹ Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive) [2002] OJ L108/51.

³⁴⁰ Services Directive 2006/123/EC.

³⁴¹ Payment Services Directive 2007/64.

³⁴² Air Passenger Rights Regulation 261/2004.

³⁴³ *European Commission Staff Working Paper, "An Energy Policy for Consumers"* SEC(2010)1407 final, fn.17 at p.11 [http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec\(2010\)1407.pdf](http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec(2010)1407.pdf)

the degree of protection actually provided (if at all).³⁴⁴ Moreover, Waddington observes that the failure to protect vulnerable consumers may, in light of the United Nations Convention on the Rights of Persons with Disabilities, itself potentially amount to a breach of the European Union's obligations under international human rights law.³⁴⁵ As Waddington concludes, much more needs to be done to protect the vulnerable consumer.³⁴⁶ Vanessa Mak, meanwhile, has explored the difficulties in defining the European consumer; arguing that a 'pluriform' concept of the consumer has emerged; with a variation of treatment depending on whether consumer protection is being relied upon in justifying national measures in a free movement context, or when invoking the average consumer in the context of measures of positive integration.³⁴⁷

The Department of Business, Energy and Industrial Strategy commented to us: 'We recognise that difficulties exist over a rigid definition of vulnerable consumer. Consumers will find themselves in vulnerable positions according to circumstances not just physical characteristics. Any changes in the definition of vulnerable consumers should take into account the resulting impact on existing case law and consider any unintended consequences. Similarly, changes to 'average consumer' would need to take account of behavioural evidence. If small business owners were to be considered 'consumers' then the overall 'average' might be complicated and the threshold for effectively consumers increased because in general small business owners can be expected to be better informed and perhaps more circumspect in their purchasing decisions. There is some advantage in definitions that remain flexible and adaptable to the circumstances.'³⁴⁸

In conclusion, this survey has underscored that the 'average' consumer definition may have important implications for internal market purposes, but it is, on its own, unlikely to achieve a high level of consumer protection.³⁴⁹ The introduction of the notion of the 'vulnerable' consumer has, in general, been seen as a positive move towards a higher level of consumer protection, with the caveats that the definition is limited to situations where traders have particular degrees of knowledge³⁵⁰ and that some traders fear the wider application of the concept from a transaction cost perspective. Given the plurality of sectoral definitions it is difficult to avoid the conclusion that a further measure of consolidation is needed in this area.

³⁴⁴ M. Bartl, 'The Affordability of Energy: How Much Protection for the Vulnerable Consumers' (2010) 33 *Journal of Consumer Policy* 225.

³⁴⁵ Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48) [2010] OJ L303/16. For a broader discussion of the implications of the conclusion of the Convention for the EU: L. Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' (2011) *Maastricht Journal of European and Comparative Law* 431.

³⁴⁶ Waddington, above. 'It is not difficult to conclude that, under the Convention, the [EU] should be taking specific steps to protect consumers with disabilities where necessary. Of course, disability or impairment is only one of many potential causes of consumer 'vulnerability', and not all persons with disabilities will be 'vulnerable'. The [EU] must therefore not only pay greater attention to the need to protect 'vulnerable' consumers who are disabled, but all consumers who find themselves in a situation which renders them vulnerable. Greater recognition of the diversity of all consumers could create a framework within which to do this.'

³⁴⁷ V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive,' (TISCO), Working Paper Series No.04/2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626115.

³⁴⁸ 11 August 2016. Cf. UK European Consumer Centre: 'We believe these to be valid and fit for purpose. The current arrangements offer appropriate balance between the rights of parties, which does not impede trade, at the same time offering significant degree of protection.'

³⁴⁹ Devenney cited above.

³⁵⁰ Report p.5.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Waddington argues that the coverage of vulnerability in the horizontal directives is inadequate; and this would seem to be underscored in the elaborations of vulnerability in the fragmented patchwork *inter alia* of the services and utility market directives (see above). As for the UCTD, the UK has, as analysed above, had a possibly unique testing of the directive as it applies to vulnerable consumers in *Abbey National* in which the Supreme Court came to the controversial conclusion that the UCTD had intended to advance contractual freedom rather than fairness.³⁵¹ More could possibly be done in that sector-specific 'services' and utilities legislation and in the UCTD to ensure the protection of vulnerable consumers. However the case can be made, given the fragmentation of the law on vulnerable consumers, that (a) broader consolidation measure(s) need to be adopted.

Moreover, it is worth noting that the CMA, with the objective *inter alia* of addressing the fall-out from *Abbey National*, launched a market investigation into retail banking.³⁵² The CMA report on retail banking, issued on 9 August 2016, specified measures to ensure greater transparency and the voluntary capping of bank charges especially for (vulnerable?) consumers without arranged overdrafts. The consumer organisation Which? has subsequently challenged whether such voluntary schemes can work, especially in the light of recent research into behavioural economics;³⁵³ arguing that more stringent standards need to be laid down in legislation. As Alex Niell, Director of Policy and Campaigns at the consumer organisation Which? commented on the CMA proposals:

'The steps outlined today, to provide customers with better information and an improved switching experience, are welcome. However it is questionable whether these measures will be enough, not only to increase competition but also to ensure banks deliver a better service for their customers....' 'It is disappointing that the monthly charge cap is not actually a cap and banks will be allowed to continue to charge exorbitant fees for so called unauthorised overdrafts, rather than protect those customers that have been identified as among the most vulnerable.'³⁵⁴

1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Generally a positive balance, yet still some concerns remain as to how the regime could be optimised and as to how, on particular interpretations of EU law, the correct application of consumer protection can be ensured in the absence of referral of the relevant case to the CJEU under Article 267 TFEU (see above). The Consumer Council for Northern Ireland also noted:

'It is the Consumer Council's view that the effectiveness of EU legislation, and the domestic laws that implement them, largely depends on levels of

³⁵¹ *Abbey National*, above, fn.168; H. Collins, 'Good Faith in European Contract Law' (1994) *OJLS* 229.

³⁵² <https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution>.

³⁵³ Commission Guidance on the Implementation/Application of the Directive on Unfair Commercial Practices SEC(2009) 1666, pp32-33: 'It is then for the national courts and administrative authorities to assess the misleading character of commercial practices by reference, among other considerations, to the current state of scientific knowledge, including the most recent findings of behavioural economics. Thus, for example, the use of defaults (...) or the provision of unnecessarily complex information may, according to the circumstances of the case, prove misleading.'

³⁵⁴ Which on CMA report into retail banking: <http://www.which.co.uk/campaigns/better-banks/CMA-banking-inquiry-FCA-better-banks/>.

awareness that exist amongst consumers and businesses. Without sufficient awareness, businesses may deliberately or inadvertently fail to comply with legal requirements and consumers will not utilise the laws that have been put in place to protect them.

The Consumer Council conducts research every four years which assesses consumers' proficiency, including awareness of their rights. Since the research began in 1998, the proportion of NI consumers who feel well informed about their rights has increased, with awareness in 2015 returning to levels last seen in 2007...

In our latest research study, three fifths of NI consumers felt they were well informed about their rights. However, when survey participants were tested against true/false statements relating to everyday applications of consumer law, it was evident that many, including those who felt well informed, were not as proficient as they thought.'

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Some would say that there is much greater transparency on price in the wake of the Price Information Directive; others, however, point to discounting, particularly prevalent on the UK retail market, which can sometimes confuse consumers as to the correct price indications. As noted above, there has been a super-complaint raised by Which? on the implementation of the PID and pricing practices in the groceries sector. While the CMA did not consider that pricing practices were systemically abusive, they nevertheless made a number of recommendations to improve practice.³⁵⁵

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

The overall protection of business has been improved since the implementation of the MCAD, and the introduction of a more level playing field. Perhaps inevitably, however, some small businesses may continue to be concerned at the regulatory burden.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

It seems that businesses, generally, have found it easier to trade cross-border in recent years and certainly consumers appear to be more willing to trade across borders. But further vigilance is needed to monitor up-take and further statistics are required. The UK European Consumer Centre noted: 'It is easier thanks to the rules being more uniform across the community. This, however, is mostly thanks to other laws concerning sale of goods, distance sales, etc.'

- To what extent are these improvements, if any, due to the mentioned directives?

The directives have certainly helped in creating a more level playing field and increasing consumer confidence. Yet other factors have also played a role: modern technology makes cross-border transactions far easier to engage in than was once the case; moreover, consumers have adapted to a more inter-connected Europe: borders have become more porous and consumers have more confidence in cross-border transactions.

³⁵⁵ Report p.8.

Annex

A. Transposition fact sheet

Table 1: Fact sheet on transposition of directives in Member States' law – United Kingdom

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
Directive 93/13/EEC on unfair terms in consumer contracts	Consumer Rights Act 2015.		'Black list' of terms considered unfair in all circumstances	Yes	See, in particular, ss. 31, 47, 57 and 65	
			'Grey list' of terms which may be considered unfair	Yes	See Schedule 2, discussed above at P.28.	
			Extensions of the application of Directive to individually negotiated terms	Yes	See s.2.	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	See s.64.	<i>It is debatable whether s.64 properly transposes the UCTD.</i>

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market	Consumer Protection from Unfair Trading Regulations 2008		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	Various: See C. Willett & Peter Sparkes' Country Report for Civic Consulting: 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part - Final report and country reports' (2011) - http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf	
			Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	Various (Accommodation Agencies Act 1953): See C. Willett & Peter Sparkes' Country Report for Civic Consulting: 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part - Final report and country reports' (2011) - http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf	
			Application of UCPD to B2B transactions	No	See, in particular, Regulation 2.	

Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers	Price Marking Order 2004		Extension of the application to other sectors (e.g. for immovable property)	The UK has taken advantage of various exclusions.	The relevant provisions only apply to 'products'. However, the relevant provisions are not applicable to products supplied in the course of a service (Regulation 3); not applicable to sales by auction and artwork/antiques (Regulation 3); not applicable to vending machines (Regulation 5(3)); not applicable in relation to small businesses (Schedule 2).	
			Use of specific regulatory choices/derogations	See above.	See above.	
Directive 2006/114/EC concerning misleading and comparative advertising	Business Protection from Misleading Marketing Regulations 2008					
Directive 2009/22/EC on injunctions for the protection of consumers' interests	Enterprise Act 2002, Part 8 (as amended)					

Table 2: Fact sheet on Injunctions Directive – United Kingdom

Issue	Answer	Comments
Is the injunction procedure as foreseen by the Injunctions Directive regulated in your country separately (as a separate procedure or/and in a separate legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (the Unfair Contract Terms Directive or/and the Unfair Commercial Practices Directive or/and by the Consumer Rights Directive)?	- Yes, separate procedures in separate legal acts	<i>As noted above in the report, there is some scope from streamlining the procedures in the Enterprise Act 2002 with other enforcement provisions (e.g. under the Consumer Rights Act 2015).</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	<i>See, in particular, ss.213 and 219C. See also Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005/917.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	<i>See s.217.</i>

<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations) are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>- <i>Which?</i> noted: ‘Court action in the UK is very expensive. Not only does the enforcer have to bear its own costs of bringing proceedings, if the enforcer loses the action then it also has to pay the trader’s legal costs, which could be very significant. This problem is often exacerbated by an inequality of arms as between a consumer organisation or public enforcer on the one hand, and a large corporation with a substantial litigation budget on the other...The Directive itself is silent on costs. For <i>Which?</i>, the cost of litigating, and our exposure to the risk of paying the trader’s costs, has inevitably been a key consideration when contemplating action. The same is true for Trading Standards, who tell us that pursuing civil cases is often too costly for them, and that adverse costs risk – particularly in the context of falling local authority budgets – is a significant factor in deterring actions. Importantly, Trading Standards do not have rights of audience in the civil courts (as opposed to the criminal courts, where they do) which means they have the additional cost of hiring counsel.’</p>	
<p>Is the scope of application of injunctions extended to cover areas of consumer law that are not part of Annex I of the Directive, or consumer law in general?</p>	<p>- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive</p>	<p><i>See s.211 (‘domestic infringements’).</i></p>
<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>No</p>	<p><i>Although note that under s.210 that a ‘consumer’ can include situations where ‘the individual receives or seeks to receive the goods or services with a view to carrying on a business but not in the course of a business carried on by him.’</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- Yes</p>	<p><i>S.217 applies to a ‘person’ and, under the Interpretation Act 1978, s.6, that would include ‘persons’.</i></p>

Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- Yes - No	<i>This is central to, for example, the CMA's enforcement strategy.</i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- Yes, requirement for party seeking injunction to consult with the defendant	<i>See s.214 (and s.216 on co-ordination).</i>
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Yes, other sanction (please specify)	<i>A fine and potentially imprisonment (see s.220 and Phillimore v. Surrey County Council [2010] EWCA Civ 61).</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>See, for example, s.217(8).</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	See comments.	<i>S.215 deals with jurisdiction. Criminal proceedings are in addition to this enforcement route.</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	<i>Not specifically mentioned in the new 'enhanced consumer measures' but might have some form of restitution, in the widest sense, under the general law (e.g. Powers of Criminal Courts (Sentencing) Act 2000, s.130(4)).</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	<i>S.219A(2) states, in relation to the redress category, 'where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.' In the relevant guidance (Enhanced Consumer Measures: Guidance for Enforcers of Consumer Law (BIS/15/292, (2015)) BIS noted that this money could not be paid to the Treasury (see p.13) but could, for example, be paid to a charity (see[63]-[64]).</i>

Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- Yes	<i>Under s.219A(2).</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>To some extent: cf. OFT v. Foxtons Ltd.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>S.217(8) provides: 'An enforcement order may require a person against whom the order is made to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement— (a) the order; (b) a corrective statement.' Note also the enhanced consumer measures in ss.219A-C.</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes	<i>See s.217(6): 'A person complies with this subsection if he—(a) does not continue or repeat the conduct; (b) does not engage in such conduct in the course of his business or another business; (c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)).'</i>

B. Data tables

Number of B2C disputes

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	See comments below.

Given, for example, the way in which B2C disputes are often addressed through discussion between the trader and a relevant authority, it is impossible to accurately estimate how many B2C disputes have been decided in the UK on the basis of the consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation. However, note that: (i) the low number of proposed prosecutions under the CPUTR 2008 was a key driver in the UK introducing a specific private right of redress in respect of unfair commercial practices; (ii) there is very little case law specifically on the PMO 2004;³⁵⁶ and (iii) particularly in connection with unfair terms, there is evidence of the effectiveness of negotiation by relevant bodies prior to formal enforcement action being sought.³⁵⁷

³⁵⁶ Cf. also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 2.43ff.

³⁵⁷ See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).³⁵⁸

Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure					See comments below.
ADR or other relevant procedure					See comments below.

Notes: This is a debated issue³⁵⁹ in the UK and is, of course, dependent on a number of variables.³⁶⁰ For example in response to a 2011 call for evidence,³⁶¹ BIS noted that ‘...no evidence specific to consumer to business disputes was forthcoming.’³⁶²

‘ADR can offer a cheaper and quicker alternative to the courts for disputes where a consumer is not able to resolve their complaint directly with the business from whom they made their purchase. It is estimated that ADR costs are between 1/8th and 1/3rd of the cost of going to court and the European Commission have estimated that it only takes up to 90 days for most disputes referred to ADR to be resolved. ADR in the UK tends to be free for the consumer, as it is often funded through businesses paying membership fees, levies or case fees to the ADR provider.’³⁶³

BIS also noted:

‘Indeed, UK ADR providers report that a significant number of the cases they currently deal with would never have gone to court. Other stakeholders noted that in their view very small value claims may not be suitable for either court action or ADR....A few stakeholders suggested ADR is not always a lower cost or quicker option compared to court action, particularly for complex cases. One stakeholder noted that there would only be cost-savings if the outcome of ADR were followed, as otherwise disputes may still end up in court.’³⁶⁴

³⁵⁸ For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

³⁵⁹ See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).

³⁶⁰ Cf. BIS, Alternative Dispute Resolution for Consumers: Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation (BIS/14/1122 (2014)) p.8: ‘ADR in the UK tends to be free for the consumer, as it is often funded through businesses paying membership fees, levies or case fees to the ADR provider.’

³⁶¹ BIS, Call for Evidence on EU proposals on Alternative Dispute Resolution, (URN 11/1372, (2011)).

³⁶² See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).

³⁶³ BIS, Alternative Dispute Resolution for Consumers: Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation (BIS/14/1122 (2014)) p.8.

³⁶⁴ See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).

Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation

A consumer went on a package holiday with a friend to Kenya for which they paid € 2000 per person. The holiday was a disaster. The flight was delayed by 12 hours. The air conditioning in the hotel was not working at all. The safari trip took place but not in the park they had been promised; on top of that, they were transported there by bus instead of by plane. They complained to the tour operator and asked for compensation amounting to a total of €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 only, pointing to a provision in the contract limiting the organiser's liability to 25% of the total cost of the holiday. When the consumer asked, her local consumer association told her that terms which inappropriately limit the trader's liability in case of inadequate contractual performance are most probably unfair. The consumer decided to take the tour operator to court to enforce her rights.

[Example adapted from http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

As noted above, public enforcement is the cornerstone of the enforcement of the UCTD in the UK. Moreover, as also noted above, there is evidence of the effectiveness of negotiation by relevant bodies prior to formal enforcement action being sought.³⁶⁵

³⁶⁵ See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

C. Interviews conducted and literature reviewed

Table 5: Interviews conducted for this study

Organisation	Stakeholder type	Date
Federation of Small Businesses	Business association	30 August 2016
Business, Energy and Industrial Strategy) (formerly BIS)	Ministry	11 August 2016
European Consumer Centre	European Consumer Centre	26 August 2016
Which?	Consumer organisation	28 August 2016
Consumer Council of Northern Ireland	Consumer organisation	31 August 2016

Table 6: Literature reviewed for country report

Author/Source	Year	Title of publication
M. Bartl	2010	'The Affordability of Energy: How Much Protection for the Vulnerable Consumers' (2010) 33 Journal of Consumer Policy 225.
H.G. Beale	1995	'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in J Beatson & D Friedmann (eds), <i>Good Faith and Fault in Contract Law</i> , (1995, Clarendon, Oxford).
H.G. Beale (ed.)	2015	<i>Chitty on Contracts</i> (32 nd edn., Sweet & Maxwell, London, 2015)
S. Bright	2000	'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331.
A. Colombi-Ciacchi & S. Weatherill	2010	<i>Regulating Unfair Banking Practices in Europe</i> (OUP, 2010).
H. Collins	1994	'Good Faith in European Contract Law' (1994) <i>OJLS</i> 229
J. Davies & E. Szyzszak	2010	ADR: effective protection of consumer rights?' (2010) <i>E.L.Rev.</i> 695
J. Devenney & M. Kenny	2012	'Unfair Terms and the Draft Common Frame of Reference: The Role of Non-Legislative Harmonisation and Administrative Co-Operation?' in J. Devenney and M. Kenny, <i>European Consumer Protection: Theory and Practice</i> (Cambridge University Press, 2012).
J. Devenney & M. Kenny	2016	'The Regulation of Unfair Terms in Non-Professional Suretyship Agreements: Lessons for the Wider EU Harmonisation Agenda' in K. Fairweather, P. O'Shea and R. Grantam (eds.), <i>Credit, Consumer and the Law: After the Global Storm</i> (in press, Ashgate 2016)
J. Devenney & M. Kenny	2015	'Omission of Personal Property from the Proposed CESL: The Hamlet Syndrome...Without the Prince?' [2015] <i>The Journal of Business Law</i> 607.
J. Devenney	2016	'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices', (2016) 5 <i>EuCML</i> 100.
J. Devenney	2015	'Conceptualising Consumers in the Law of England and Wales' in K. Riesenhuber and F. Klinck (eds), <i>Verbraucherleitbilder: Interdisziplinäre und Europäische Perspektiven</i> (de Gruyter, 2015)
J. Devenney	2013	'Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence', in L. Di Matteo, K. Rowley, Q. Zhou & S. Santier, <i>Current Issues in Commercial Contracts: Transatlantic Perspectives</i> (Cambridge University Press, 2013).
J. Devenney, M. Kenny & L. Gillies	2012	'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', (2012) <i>Yearbook of Private International Law</i> 315 at 335-336.
J. Devenney & T. Pfeiffer	2013	'Control of Standard Terms (Collective Proceedings)' in G. Dannemann & S. Vogenauer, <i>The Common Frame of Reference for European Contract Law and its Interaction with English and German Law</i> (Oxford University Press, 2013).
J. Devenney	2011	'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] <i>NILQ</i> 33.
A.M. Dugdale, M. Jones and M. Simpson	2015	<i>Clerk and Lindsell on Torts</i> , (21 st edn., Sweet & Maxwell, 2015)
J. Garside	2016	'Trading standards institute: consumers are no longer protected', <i>The Guardian</i> , 7 th August 2016.
R. Halson and D. Campbell	2013	'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), <i>The Transformation of Private Law</i> , (Cambridge University Press 2013).

P. Hellwege & L. Miller	2013	'Control of Standard Contract Terms', in in G. Dannemann & S. Vogenauer, <i>The Common Frame of Reference for European Contract Law and its Interaction with English and German Law</i> (Oxford University Press, 2013).
M. Himoni	2016	<i>European consumer law: a law for the consumer or the internal market? The case of the consumer right directive and its application to the UK and Cypriot regimes</i> (unpublished Ph.D thesis, University of Leeds, 2016).
G. Howells, H-W. Micklitz and T. Wilhelmsson	2009	'Towards a better understanding of unfair commercial practices', (2009) 51 Int. J.L.M. 69.
F. Kessler M. Koutsias and C. Willett	1943	'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 Columbia L Rev 629.
	2012	'The Unfair Commercial Practices Directive in the UK' Erasmus Law Review, 5 (4) 2012
R. Lawson		Exclusion Clauses and Unfair Contract Terms, (11 th Ed.)
PH Lindblom	2008	'ADR - The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden' (2008) 1 ERPL 63.
J. Luzak	2015	'Online disclosure rules of the Consumer Rights Directive: Protecting passive or active consumers?' (2015) 3 Journal of European Consumer and Market Law 79.
V. Mak	2010	'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive,' (TISCO), Working Paper Series No.04/2010
H. McGregor	2014	<i>McGregor on Damages</i> , (19 th edn., Sweet & Maxwell, London, 2014) para. 5-012.
O'Keefe		<i>The Law of Weights and Measures</i> (2 nd Edn., Butterworth, London, 1996-)
D. Parry, R. Rowell, B.W. Harvey and C. Ervine		<i>Butterworths Trading and Consumer Law</i> (Lexis, 1996-
J. Poole & J. Devenney	2007	<i>Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles</i> [2007] Journal of Business Law 269-305.
J. Poole and A. Keyser	2005	<i>Justifying Partial Rescission in English Law</i> [2005] 121 LQR 273.
L. Poro	2014	'Unfair commercial practices in financial services: is the EU legal framework sufficient to protect consumers?' (2014) 29 J.I.B.L.R. 422.
I. Ramsay	2007	<i>Consumer Law and Policy: Text and Materials on Regulating Consumer Market</i> (2 nd . Edn., Hart Publishing, 2007) Ch. 4.
N. Reich		Understanding EU Consumer Law
C. Scott & J. Black	2000	<i>Cranston's Consumers and the Law</i> (3 rd edn., Butterworths, 2000)
C. von Bar & E. Clive	2009	<i>Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)</i> (Sellier, Munich, 2009)
L. Waddington	2013	'Vulnerable and Confused: the protection of 'vulnerable' consumers in EU law' (2013) 38(6) <i>ELRev</i> 757.
C. Willett	2007	<i>Fairness in Consumer Contracts: The Case of Unfair Terms</i> (Ashgate Publishing, Aldershot, 2007)